FILED
04-1502 MAY 2 - 2005
OFFICE OF THE CLERK

No. 04-_____

In The
Supreme Court of the United States

HORN FARMS, INC.,

Petitioner,

v.

MIKE JOHANNS,
SECRETARY OF AGRICULTURE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

KAREN BUDD-FALEN
Counsel of Record
BRANDON L. JENSEN
BUDD-FALEN LAW OFFICES, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, Wyoming 82001
(307) 632-5105

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

f/o

QUESTIONS PRESENTED FOR REVIEW

The wetland conservation provisions of the Food Security Act of 1985, as amended by the Food, Agriculture, Conservation, and Trade Act of 1990 and the Federal Agriculture Improvement and Reform Act of 1996, make it unlawful to convert a wetland "by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland," unless one or more of the statute's exemptions apply. 16 U.S.C. §§ 3821(c), 3822(b) (Supp. IV 1998). Any person who in any crop year violates the wetland conservation provisions shall be permanently ineligible for certain payments, loans, or programs administered by the United States Department of Agriculture. 16 U.S.C. §§ 3821(a)(2), (b), and (c) (Supp. IV 1998).

Accordingly, the Petitioner's questions presented for review include the following:

1. Whether the United States Court of Appeals for the Seventh Circuit erred in holding that an exemption to program ineligibility, as set forth in 16 U.S.C. § 3822(b)(2)(D) (Supp. IV 1998), for wetlands previously converted for the production of an agricultural commodity, was inapplicable if wetland characteristics returned prior to the enactment of the Food Security Act of 1985?

2. Whether the statute permanently terminating a farmer's eligibility, in its entirety, is a violation of the Spending Power of the United States Constitution, because it amounts to impermissible coercion?

PARTIES TO THE PROCEEDING AND CORORATE DISCLOSURE STATEMENT

The Petitioner in this Court is Horn Farms, Inc. There are no parent corporations, publicly held companies, or investment funds that hold any ownership interest in the corporation. The corporation is privately–owned in its entirety by Gene and Ellen Horn of Kewanna, Indiana.

The Respondents in this Court are Mike Johanns, in his official capacity as Secretary of the United States Department of Agriculture; the United States Department of Agriculture; Steven Rodenberg, in his official capacity as Fulton County Executive Director of the United States Farm Service Agency, an agency of the United States Department of Agriculture; and Daniel M. Rosswurm, in his official capacity as District Conservationist of the United States Natural Resources Conservation Service, an agency of the United States Department of Agriculture.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Statutory Background	3
B. Factual Background	5
C. Initiation of Judicial Review and the District Court's Decision	7
D. The Seventh Circuit's Decision	9
REASONS FOR GRANTING THE PETITION	10
I. THE CIRCUITS ARE SPLIT OVER THE USDA'S AUTHORITY TO TERMINATE ELIGIBILITY BASED ON THE CONVERSION OF A WETLAND PRIOR TO THE ENACTMENT OF SWAMPBUSTER IN 1985	10
II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE LEGISLATIVE HISTORY OF THE SWAMPBUSTER WAS IRRELEVANT IN UPHOLDING THE SECRETARY'S INTERPRETATION OF THE STATUTE UNDER *CHEVRON*	15

TABLE OF CONTENTS – Continued

Page

III. REVIEW BY THIS COURT IS WARRANTED TO CLARIFY LIMITATIONS ON CONGRESS' SPENDING POWER TO CONDITION THE RECEIPT OF FEDERAL FUNDS BASED UPON COMPELLED COMPLIANCE WITH A STATUTORY SCHEME 20

CONCLUSION 30

APPENDIX A (Seventh Circuit Decision)
397 F.3d 472 (7th Cir. 2005) 1a

APPENDIX B (District Court Decision)
319 F.Supp.2d 902 (N.D. Ind. 2004) 12a

APPENDIX C (Administrative Decisions)
NRCS Preliminary Technical Determination 53a
NRCS Non-Agricultural Determination 64a
NRCS Final Technical Determination 67a
Farm Service Agency Decision 81a
FSA Fulton County Committee Decision 84a
Hearing Officer's Preliminary Decision 86a
Hearing Officer's Final Decision 90a
Denial of a Director Review Request 94a
Second Denial of a Director Review Request 96a

APPENDIX D (NRCS Field Notes) 99a

APPENDIX E (United States Code) 101a

APPENDIX F (Code of Federal Regulations) 113a

TABLE OF AUTHORITIES

Page

CASES:

A.W. v. The Jersey City Public Schools, 341 F.3d 234 (3rd Cir. 2003) 29

B&D Land and Livestock, Co. v. Veneman, 231 F.Supp.2d 895 (N.D. Iowa 2002) 22

Barthel v. United States Department of Agriculture, 181 F.3d 934 (8th Cir. 1999) 13, 14, 16

Bradley v. Arkansas Department of Education, 189 F.3d 745 (8th Cir. 1999) 26

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1994) 9, 11, 15

College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board, 527 U.S. 666 (1999) 20, 21, 21

Commonwealth of Virginia, Department of Education v. Riley, 106 F.3d 559 (4th Cir. 1997) (*en banc*) 27

Doe v. State of Nebraska, 345 F.3d 593 (8th Cir. 2003) 27

Frost v. Railroad Commission of the State of California, 271 U.S. 583 (1926) 24, 25

General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004) 15

Greene v. McElroy, 360 U.S. 474 (1959) 30

Gunn v. United States Department of Agriculture, 118 F.3d 1233 (8th Cir. 1997) 12, 13

Horn Farms, Inc. v. Veneman, 319 F.Supp.2d 902 (N.D. Ind. 2004) 22

TABLE OF AUTHORITIES – Continued

Page

Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987) 15

Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (*en banc*) 27

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990) 18

Kansas v. United States, 24 F.Supp.2d 1192 (D. Kan. 1998), *aff'd*, 214 F.3d 1196 (10th Cir. 2000) .. 21, 27

Koslow v. Commonwealth of Pennsylvania, 302 F.3d 161 (3rd Cir. 2002) 29

Massachusetts v. Mellon, 262 U.S. 447 (1923) 20

Mich. Dep't of State v. United States, 166 F.Supp.2d 1228 (W.D. Mich. 2001) 21

National Wildlife Federation v. Agricultural Stabilization and Conservation Service, 955 F.2d 1199 (8th Cir. 1992) 18, 22

New York v. United States, 505 U.S. 144 (1992) 20, 24

Oklahoma v. Schweiker, 655 F.2d 401 (D.C. Cir. 1981) 21

Perry v. Sindermann, 408 U.S. 593 (1972) 29

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 24

South Dakota v. Dole, 483 U.S. 203 (1987) 9, 20, 25, 26, 28

State of California v. United States, 104 F.3d 1086 (9th Cir. 1997) 27

State of Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989) 21, 27

Steward Machine Co. v. Davis, 301 U.S. 548 (1937) 21

TABLE OF AUTHORITIES – Continued

Page

United States v. Butler, 297 U.S. 1 (1936) 24, 25

United States v. Dierckman, 201 F.3d 915 (7th Cir. 2000) 22

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 30

United States v. Sabri, 183 F.Supp.2d 1145 (D. Minn. 2002) 27

United States v. Sabri, 326 F.3d 937 (8th Cir. 2003) .. 27, 28

United States v. Shimer, 367 U.S. 374 (1961) 15

West Virginia v. United States Department of Health and Human Services, 289 F.3d 281 (4th Cir. 2002) 27, 28

STATUTES AND REGULATIONS:

Farmland Protection Policy Act, 7 U.S.C. § 4201 *et seq.*:
7 U.S.C. § 4201(a)(7) (1994) 2

Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (December 23, 1985) 3
16 U.S.C. § 3821 (Supp. III 1985) 3

Food, Agriculture, Conservation, and Trade Act, Pub. L. No. 101-624, 104 Stat. 3359 (November 28, 1990) 3
16 U.S.C. § 3821(a) (Supp. II 1990) 4
16 U.S.C. § 3821(b) (Supp. II 1990) 3, 4
16 U.S.C. § 3821(b)(1)(A) (Supp. II 1990) 4

Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (April 4, 1996) 19

TABLE OF AUTHORITIES – Continued

Page

Food Security Act, *as amended*:
16 U.S.C. § 3821(a) (Supp. IV 1998) 1, 3
16 U.S.C. § 3821(b) (Supp. IV 1998) 3
16 U.S.C. § 3821(c) (Supp. IV 1998) 1, 3
16 U.S.C. § 3822(b) (Supp. IV 1998) 1, 3
16 U.S.C. § 3822(b)(1)(A) (Supp. IV 1998) 3, 17
16 U.S.C. § 3822(b)(1)(G) (Supp. IV 1998) ..... *passim*
16 U.S.C. § 3822(b)(2)(D) (Supp. IV 1998) ..... *passim*
16 U.S.C. § 3822(i) (Supp. IV 1998) 3, 5

7 C.F.R.:
Section 12.1 (1999) 2
Section 12.2 (1999) 2, 8, 11, 16
Section 12.3 (1999) 2
Section 12.4 (1999) 2
Section 12.5(b) (1999) 2
Section 12.5(b)(1)(ii) (1999) 7, 16
Section 12.5(b)(4) (1999) 5
Section 12.33(a) (1992) 13
Section 12.33(b) (1996) 4
Section 614.102 (1999) 5

MISCELLANEOUS:

H.R. Rep. No. 99-271, pt. 1, 99th Cong. (1st Sess. 1985), *reprinted in* 1985 U.S.C.C.A.N. 1103 ..... 17, 18, 22

136 Cong. Rec. H11029, 11345 (daily ed. Oct. 22, 1990) (statement of Rep. De La Garza) 23

Baker, Lynn A., *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995) 29

Chemerinsky, Erwin, *Protecting the Spending Power*, 4 CHAP. L. REV. 89 (2001) 21

TABLE OF AUTHORITIES – Continued

Page

Douglas, Patrick R., *Conservation or Coercion: Federal Regulation of Intrastate Wetlands Under the Swampbuster Provisions of the Food Security Act*, 8 MO. ENVTL. L & POL'Y REV. 59 (2001)..... 22

McBeth, Daryn, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 HARV. ENVTL. L. REV. 201 (1997)..... 4

Zietlow, Rebecca E., *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141 (2002)..... 29

PETITION FOR WRIT OF CERTIORARI

Petitioner Horn Farms, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. A, *infra*, 1a-11a) is reported at 397 F.3d 472. The opinion of the United States District Court for the Northern District of Indiana, South Bend Division, the Honorable Judge Allen Sharp presiding (App. B, *infra*, 12a-52a), is reported at 319 F.Supp.2d 902. The opinions and orders of the various administrative agencies are reproduced herein at App. C, *infra*, 53a-98a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Spending Clause of the United States Constitution, which authorizes Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. The relevant provisions of the Food Security Act, 16 U.S.C. §§ 3821 and 3822(b) (Supp. IV 1998), are reproduced herein at App. E, *infra*, 106a-112a.

The pertinent regulations, 7 C.F.R. §§ 12.1 through 12.5 (1999), are reproduced herein at App. F, *infra*, 113a-134a.

STATEMENT OF THE CASE

Fundamentally, this matter concerns the balance between protecting the Nation's long-term capability to produce food and fiber, and preserving the functions and values of the Nation's wetlands. The issue in this case is whether, pursuant to the Food Security Act of 1985, the United States Department of Agriculture ("USDA") properly has jurisdiction over previously converted wetlands, which at one time were lawfully converted for the production of one or more agricultural commodities, even though wetland characteristics returned prior to the enactment of the Food Security Act on December 23, 1985.

Despite Congress' admonition that farmland is not to be irreversibly converted to nonagricultural uses and its assurance that other national interests will not override the importance of the protection of farmland nor otherwise outweigh the benefits of maintaining farmland resources, 7 U.S.C. § 4201(a)(7) (1994), the Seventh Circuit Court of Appeals held that if the wetland characteristics of a prior lawfully converted wetland return at any time prior to December 23, 1985, then the Petitioner and others remain subject to the prohibitions of the Food Security Act of 1985. Failure to adhere to the provisions of the Act shall result in the termination of eligibility to receive various farm subsidies from the USDA; a coercive or punitive measure, which remains attached to both the Petitioner and his private property in perpetuity.

A. Statutory Background.

Congress enacted the wetland conservation provisions of the Food Security Act on December 23, 1985. Pub. L. No. 99-198, §§ 1221-1222, 99 Stat. 1507 (1985) (codified at 16 U.S.C. §§ 3821-3822). The Act's wetland conservation provisions are commonly referred to as "Swampbuster," because the Act seeks to provide an economic encouragement to farmers to voluntarily conserve wetlands located on their privately-owned property, and conversely, seeks to remove any economic incentives for farmers to produce agricultural commodities on converted wetlands. Specifically, any person who produces an agricultural commodity on a converted wetland after December 23, 1985, shall be ineligible for certain benefits provided by the USDA. 16 U.S.C. § 3821 (Supp. III 1985); App. E, *infra*, 101a-102a.

However, in 1990, Congress strengthened the provisions of Swampbuster through the enactment of the Food, Agriculture, Conservation, and Trade Act. Pub. L. No. 101-624, § 1421(b), 104 Stat. 3572 (November 28, 1990). While retaining the original 1985 prohibitions, the 1990 amendments additionally provided that "any person who in any crop year subsequent to November 28, 1990, converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland shall be ineligible" for certain benefits provided by the USDA. 16 U.S.C. § 3821(b) (Supp. II 1990); App. E, *infra*, 103a-105a.

Consequently, subsequent to the 1990 amendments, any person could become ineligible for certain USDA benefits by *either* (1) converting a wetland *and* producing agricultural commodities after December 23, 1985, or (2) merely converting a wetland after November 28, 1990, so that agricultural commodities *could* be produced. 16

U.S.C. §§ 3821(a), (b) (Supp. II 1990); App. E, *infra*, 103a-105a. Nevertheless, under the Act and the 1990 amendments, no person shall become ineligible as the result of the production of an agricultural commodity on a converted wetland if the conversion of such wetland occurred before December 23, 1985. 16 U.S.C. § 3822(b)(1)(A) (Supp. II 1990); App. E, *infra*, 105a-106a.

Finally, and perhaps most importantly, the 1996 reauthorization of the Food Security Act, via the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 322(b), 110 Stat. 888, 988-89 (April 4, 1996), provides for the lawful conversion of a wetland, "if the original conversion of the wetland occurred prior to December 23, 1985, and the wetland characteristics returned *after that date* as a result of the lack of maintenance of drainage, the lack of management of the lands containing the wetlands, or circumstances beyond the control of the person." 16 U.S.C. §§ 3822(b)(1)(G), (b)(2)(D) (Supp. IV 1998) (emphasis added). This language effectively repealed the Natural Resources and Conservation Service's regulations pertaining to abandonment.

Previously, if a farmer abandoned a prior converted wetland, which was exempt from the provisions of Swampbuster, for five years during which time the wetland characteristics returned, the prior converted wetland was considered "abandoned" and was "re-labeled" as a wetland, subject to the provisions of Swampbuster. 7 C.F.R. § 12.33(b) (1996). However, the 1996 amendments "perfect" a prior converted wetland status for a landowner: once a prior converted wetland, always a prior converted wetland. McBeth, Daryn, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 HARV. ENVTL. L. REV. 201, 256 (1997).

B. Factual Background.

Petitioner Horn Farms is owned and operated by Mr. Gene Horn. Between February 8, 1995 and February 28, 1996, Petitioner Gene Horn purchased 150 acres of farmland in Fulton County, Indiana. Mr. Horn principally produces agricultural commodities such as corn and soybeans for sale at market. Prior to 1999, the Petitioner was eligible to participate in, and receive loans and subsidies from, various agriculture programs administered by the USDA. App. B, *infra*, 13a.

In the late 1970's, the drainage tile system on the Petitioner's private property began to fall into disrepair and needed to be replaced. *Id.* at 14a-15a, 32a, 41a-43a; App. A, *infra*, 2a; and App. D, *infra*, 99a-100a. The Petitioner determined that his property had previously been farmed, but portions had reverted to wetlands through lack of maintenance of the drain tile system. *Id.* at 14a. Unfortunately, much needed repairs never occurred prior to the Petitioner's ownership. After the Petitioner purchased the property, he endeavored to replace the entire drainage tiling system to improve and more efficiently maintain water drainage. Therefore, in 1998, he converted several wetlands and restored the drain tile system throughout the property. *Id.* at 14a-15a, 41a-43a.

On May 5, 1999, the Petitioner was preliminarily notified by the NRCS that he allegedly converted 6.2 acres of wetlands in violation of the provisions of Swampbuster. *Id.* at 15a-16a; App. C, *infra*, 53a-64a. The notification provided the Petitioner an opportunity to mediate his alleged misconduct with the NRCS, as required by 7 C.F.R. § 614.102 (1999). During mediation, the NRCS provided the Petitioner with the option of restoring or mitigating the loss of the wetlands in accordance with 16 U.S.C. § 3822(i) (Supp. IV 1998) and 7 C.F.R. § 12.5(b)(4) (1999).

According to the NRCS, even though the Petitioner allegedly converted only 6.2 acres of wetlands, he was required to acquire, develop, or restore approximately 32 acres of wetlands in order to mitigate their loss. *Id.* at 16a-17a; App., *infra*, 65a-66a. Due to the substantial discrepancy between the amount of acreage allegedly converted, and the amount of acreage potentially required for restoration/mitigation, the Petitioner declined to accept the restoration/mitigation criteria. *Id.* at 17a.

Therefore, on July 30, 2001, the NRCS declared the Petitioner ineligible for all USDA programs administered by the Farm Service Agency. App. C, *infra*, 67a-81a. The final decision by the NRCS requires the Petitioner to either restore the converted areas to wetland conditions or mitigate their loss. *Id.* at 75a, 77a. According to the Farm Service Agency, and in accordance with 16 U.S.C. § 3821(c) (Supp. IV 1998), all of the Petitioner's USDA-related benefits were to be withheld beginning in 1999, and will continue through all subsequent years until the wetlands are restored or mitigated before January 1st of the subsequent crop year. App. B, *infra*, 16a; App. C, *infra*, 81a-84a. Subsequently, each of the Petitioner's administrative appeals failed. *Id.* at 17a-19a; App. C, *infra*, 84a-98a. The production of an agricultural commodity in a converted wetland, without the attendant loss of agricultural subsidies, is strictly prohibited by any successor-in-interest, even those wholly innocent of the actual unlawful conversion. Such a determination has a significant adverse impact on the fair market value of the Petitioner's property.

C. Initiation of Judicial Review and the District Court's Decision.

On November 18, 2002, the Petitioner brought this action challenging the authority of the NRCS to terminate his eligibility based on the re-conversion of a previously lawful conversion of the wetlands on his privately-owned property. The Petitioner sought to have the district court hold unlawful and set aside the USDA's termination of his eligibility. Additionally, the Petitioner sought to compel the USDA to reimburse him for those USDA payments which have been unlawfully withheld since 1999. App. B, *infra*, 27a.

Swampbuster provides for the lawful re-conversion of a wetland, if the original conversion of the wetland occurred prior to December 23, 1985, and the wetland characteristics returned *after that date* as a result of the lack of maintenance of drainage, the lack of management of the lands containing the wetlands, or circumstances beyond the control of the person. 16 U.S.C. §§ 3822(b)(1)(G), (b)(2)(D) (Supp. IV 1998) (emphasis added); and 7 C.F.R. § 12.5(b)(1)(ii) (1999). Both parties agree that the meaning of the phrase "*after that date*," determines whether the exemption is applicable to the Petitioner's wetlands and his alleged unlawful activity. *Id.* at 42a; App. A, *infra*, 2a-4a.[1]

The parties cross-moved for summary judgment, and on May 20, 2004, the district court concluded that the phrase "*after that date*," as set forth in the exemption, is

---

[1] If the Petitioner's interpretation is correct (*i.e.*, the phrase refers to the date of the original conversion of the wetlands), then the Petitioner is exempt from program ineligibility. However, if the USDA's interpretation is correct, (*i.e.*, the phrase refers to the date of the enactment of the Act, or December 23, 1985), then the Petitioner's eligibility may be subject to termination.

ambiguous as to whether it refers to the date of the enactment of the Act, December 23, 1985, or the date of the original conversion of the wetlands. *Id.* at 44a. Despite the district court's conclusion that the USDA's interpretation of the exemption was reasonable given the ambiguous language within the statute, and after reviewing the legislative history and purpose of the exemption, the district court ultimately held that the Petitioner's interpretation of the phrase is correct, and that the Petitioner's wetlands, must therefore, be classified as "prior converted wetlands," and are exempt from the prohibitions under Swampbuster, pursuant to 16 U.S.C. § 3822(b)(2)(D) (Supp. IV 1998). *Id.* at 40a-47a. The district court also held that the USDA's regulatory definition of the exemption, 7 C.F.R. § 12.2 (*wetland determination* (8)) (1999), which required the land to be in production as of December 23, 1985 in order to qualify for the exemption, exceeded the agency's statutory authority. *Id.* at 46a-47a. Accordingly, the district court granted partial summary judgment in favor of the Petitioner and remanded this matter to the USDA for action not inconsistent with its opinion. *Id.* at 51a-52a.[2]

In addition, however, the Petitioner further alleged that the statute terminating his eligibility is a violation of the Spending Power of the United States Constitution, because it amounts to impermissible coercion. *Id.* at 36a. Congress has conditioned the receipt of USDA-related funding in such a manner as to leave the recipient, such as the Petitioner herein, with no practical alternative, other than complying with the Federal mandate. The district

[2] As of October 1, 2003, the USDA had withheld from the Petitioner approximately $150,000 in payments or benefits for which he was previously entitled to receive. App. B, *infra*, 35a.

court agreed that "the Swampbuster provisions are coercive, in fact, they give the USDA a big club with which to protect wetlands." *Id.* at 37a. Nevertheless, the district court ultimately concluded that no constitutional provisions provide an independent bar to the conditional grant of federal funds by the USDA to the American farmer. *Ibid.* Accordingly, the district court granted partial summary judgment in favor of the USDA and upheld the provisions of Swampbuster as Constitutional. *Id.* at 38a-39a.

D. The Seventh Circuit's Decision.

The Seventh Circuit reversed the district court's judgment. First, similar to the district court, the court of appeals concluded that the language of the exemption, 16 U.S.C. §§ 3822(b)(1)(G), (b)(2)(D) (Supp. IV 1998), is ambiguous. App. A, *infra*, 4a. Yet, the court of appeals held that the USDA's interpretation was reasonable and entitled to substantial deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1994). *Id.* at 4a-7a. Contrary to the district court, the court of appeals determined that the legislative history of the Swampbuster to be irrelevant under *Chevron*, and moreover, lend no support to the Petitioner's arguments. *Ibid.* Second, the court of appeals affirmed the district court and upheld the constitutionality of the wetland conservation provisions under *South Dakota v. Dole*, 483 U.S. 203 (1987). *Id.* at 7a-8a. For these reasons, the court of appeals reversed the judgment of the district court. Consequently, Horn Farms, Inc. timely files this petition for certiorari.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit reached a decision in this case which is erroneous as a matter of statutory interpretation and constitutional law, and seriously infringes on a farmer's privilege of unrestricted use and enjoyment of his privately-owned property; not to mention his interest to be free from governmental interference. Moreover, it is apparent from the legislative history of Swampbuster, that Congress must not have intended the purportedly broad curtailment of private property rights that the Secretary's interpretation has permitted. This Court should grant review, because the circuits are seemingly split as to the applicability of the provisions of Swampbuster to wetlands lawfully converted prior to December 23, 1985. In addition, review is warranted in order to clarify the limitations of Congress' spending power under the Constitution to condition the receipt of federal funds upon compliance with a federal regulatory scheme under which Congress may, through the guise of its spending power, indirectly regulate the use of private property that it is unable to regulate under its constitutionally enumerated powers.

I. THE CIRCUITS ARE SPLIT OVER THE USDA'S AUTHORITY TO TERMINATE ELIGIBILITY BASED ON THE CONVERSION OF A WETLAND PRIOR TO THE ENACTMENT OF SWAMPBUSTER IN 1985

Farmers, landowners, and other agricultural producers are entitled to consistent treatment under the provisions of Swampbuster throughout the country; the fate of their activities on the wetlands located on their property should not turn on the fortuity of which circuit court their land lies within. Accordingly, the need for national uniformity is great.

The NRCS, in this case, confirmed the Petitioner's claims and agreed that sometime prior to 1985, the Petitioner's wetlands had been converted and supported the production of one or more agricultural commodities. App. B, *infra*, 41a; App. D, *infra*, 99a-100a. Even though the USDA recognized that the Petitioner's wetlands were previously converted prior to 1985, the NRCS nonetheless determined that in 1998, the Petitioner unlawfully converted approximately 6.2 acres of wetlands, in violation of Swampbuster. The district court concluded, however, that the wetlands at issue are exempt as "prior-converted wetlands" under 16 U.S.C. § 3822(b)(2)(D) (Supp. IV 1998), and that the USDA's regulatory definition of the exemption, 7 C.F.R. § 12.2 (*wetland determination* (8)) (1999), which required the land to be in production as of December 23, 1985 in order to qualify for the exemption, exceeded the agency's statutory authority. App. B, *infra*, 46a-47a.

The Seventh Circuit reversed, reasoning that since the language of the statute is in fact ambiguous, the Secretary's interpretation was "the most sensible understanding of the legislation," and entitled to "all of the deference contemplated by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." App. A, *infra*, 4a-5a. Moreover, the court of appeals was persuaded that when "after that date" is understood to be December 23, 1985, *supra*, see discussion at pp. 7-8, "the subsection is a non-degradation clause: the legislation protects wetlands as they actually existed on the date of its enactment, penalizing withdrawals without attempting to restore lands then under agricultural production. Reading 'that date' to be the time of original conversion would allow net reductions in wetlands after the legislation's enactment[.]" *Id.* at 5a.

The circuit court's decision stands in marked contrast to various judgments issued by the Court of Appeals for the Eighth Circuit and various district courts within that circuit. The Eighth Circuit has remarked that "[a]mong the exemptions to the provisions of Swampbuster is one for wetlands that had been converted to agricultural production before December 23, 1985. . . . The farming of such previously converted wetlands does not make the farmer ineligible for benefits." *Gunn v. United States Department of Agriculture*, 118 F.3d 1233, 1235 (8th Cir. 1997). While the Eighth Circuit in *Gunn v. United States Department of Agriculture* did not discuss the exception at issue herein, *i.e.*, 16 U.S.C. § 3822(b)(2)(D),[3] the court noted that even if a wetland was converted prior to 1985, the petitioner was authorized to maintain that drainage system without losing benefits, so long as the previously accomplished drainage or manipulation is not significantly improved upon. *Id.* at 1237-38.

At issue in *Gunn* was 160 acres of land in Iowa which had been farmed since 1906. *Id.* at 1235. Prior to 1906, the land was wetlands and not arable. *Ibid.* In 1906, however, the local drainage district installed tiles under the land to drain the excess water from the land. *Ibid.* By 1947, additions to the drainage system had increased the drainage area so that the amount of water in some years exceeded the capacity of the system, leaving parts of Gunn's land wet and unsuitable for farming. *Ibid.* Finally, in 1992, realizing that a drainage problem existed, the drainage district installed new drainage tiles and dug an open ditch

---

[3] It bears noting that the exception at issue herein, *i.e.*, 16 U.S.C. § 3822(b)(2)(D), was not enacted by Congress until July 3, 1996; accordingly, the Eighth Circuit could not have considered the scope of that particular exception in *Gunn*, because the actions at issue occurred in 1992.

on Gunn's land that remedied the system's shortcomings. *Ibid.* The 1992 improvements were designed to further degrade the wetland characteristics of the farm. *Id.* at 1238.

According to the Eighth Circuit, "it is the initial manipulation, not some subsequent 'applications' of it, that is to be considered." *Id.* at 1236 n.3. In fact, the court mentioned that the "initial improvement took place in 1906, and the [NRCS] told Gunn he could maintain that drainage system without losing benefits." *Id.* at 1237. Ultimately, the court concluded that part of the farm encompassed "converted wetland," but that it did not become converted wetland until 1992. *Id.* at 1238.

Moreover, in *Barthel v. United States Department of Agriculture*, 181 F.3d 934 (8th Cir. 1999), the Eighth Circuit reiterated its holding in *Gunn* by providing that farmers "'may continue to farm such wetlands . . . as they did prior to December 23, 1985. However, no action can be taken to *increase effects* on the water regime beyond that which existed on such lands' on or before that date." *Barthel v. United States Department of Agriculture*, 181 F.3d 934, 936 (8th Cir. 1999) (emphasis in original), *citing* 7 C.F.R. § 12.33(a) (1992). Consequently, "[l]and meeting [the prior converted wetland] exemption can be maintained as it was prior to the effective date of the Act without loss of federal benefits." *Ibid.* Again, as in *Gunn*, the Eighth Circuit held that under Swampbuster, the farming of a wetland should be maintained at the level that was *achieved* prior to the Act. *Id.* at 937.

At issue in *Barthel* was the permissible dredging of a drainage ditch across Barthel's 450-acre hay meadow in Nebraska. *Id.* at 935-36. Prior to 1985, Barthel was able to produce hay, and pasture his milk cows on the land. *Id.* at 936. In 1987, the USDA denied him permission to clean

the drainage ditch which left his land completely and permanently under water. *Id.* at 936-37. Barthel contended that "maintenance of the manipulation should allow them to use the land as they did prior to the passage of the Act." *Id.* at 937. The Eighth Circuit agreed, stating that the "agency's interpretation misses the clear focus on the Swampbuster provisions and the implementing regulations." *Ibid.*

According to the Eighth Circuit, the proclaimed purpose of Swampbuster is to preserve wetlands, *or, if the wetlands were altered, to preserve the conditions as altered. Ibid.* "The unambiguous focus of the statute and implementing regulations is to maintain the *status quo* of the *manipulated wetlands* – not the drainage ditch." *Id.* at 938 (emphasis added). Therefore, a technical determination which produces a result contrary to the previous *status quo* of the wetlands cannot stand. *Ibid.* "The statute and regulations mandate that the Barthels should be able to have the water and farming regime they had *before* December 23, 1985." *Ibid* (emphasis added).[4]

The Eighth Circuit's opinions stand in marked contrast to the Seventh Circuit's decision below, because the Eighth Circuit may have ultimately permitted the Petitioner's activities on his farmland. The Petitioner was attempting to maintain and repair the original drainage system on his property, and had no intention of significantly improving upon the previously accomplished drainage. Therefore, under the Eighth Circuit's interpretation of the

---

[4] Importantly, the Eighth Circuit noted that at "oral argument, counsel for the government did concede that the Barthels are entitled to the *best drainage of their land*, on or *before* December 23, 1985, that they can prove with reliable evidence." *Barthel v. United States Department of Agriculture*, 181 F.3d at 938 n.8 (emphasis added).

provisions of Swampbuster, the Petitioner would have remained eligible for benefits.

For these reasons, this Court should resolve the conflict in the lower courts by granting the petition and addressing the important question whether the USDA may terminate an individual's eligibility, based on the re-conversion of a prior lawfully converted wetland, if wetland characteristics have returned prior to the enactment of Swampbuster on December 23, 1985.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE LEGISLATIVE HISTORY OF THE SWAMPBUSTER WAS IRRELEVANT IN UPHOLDING THE SECRETARY'S INTERPRETATION OF THE STATUTE UNDER *CHEVRON*

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court held that considerable weight should be accorded to the agency's construction of a statutory scheme it was entrusted to administer, "'*unless* it appears from the statute or its *legislative history* that the accommodation is not one that Congress would have sanctioned.'" *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984) (emphasis added), *quoting United States v. Shimer*, 367 U.S. 374, 382 (1961). Even for an agency to claim all the deference possible under *Chevron*, "deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004), *citing Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987).

As set forth in greater detail above, Swampbuster provides for the lawful re-conversion of a wetland, if the

original conversion of the wetland occurred prior to December 23, 1985, and the wetland characteristics returned *after that date* as a result of the lack of maintenance of drainage, the lack of management of the lands containing the wetlands, or circumstances beyond the control of the person. 16 U.S.C. §§ 3822(b)(1)(G), (b)(2)(D) (Supp. IV 1998) (emphasis added). The USDA has interpreted this exemption as applying only in those circumstances when wetland characteristics have returned *after* the enactment of the Act, or December 23, 1985. 7 C.F.R. § 12.5(b)(1)(ii) (1999); and 7 C.F.R. § 12.2 (*wetland determination* (8)) (1999). In other words, the USDA requires the land to be in production as of December 23, 1985, in order to qualify for the exemption. *Ibid.* Both the district court and the court of appeals determined that the statutory language pertaining to the implementation of this exemption is in fact ambiguous. App. A, *infra*, 4a; App. B, *infra*, 44a.

While the district court concluded that the legislative history of the exemption supported the Petitioner's contention that the exemption is applicable even if wetland characteristics returned prior to 1985, the court of appeals reversed, reasoning that the Secretary's interpretation is reasonable, and therefore, the legislative history is irrelevant. *Id.* at 5a-6a; App. B, *infra*, 43a-47a. Nevertheless, the court of appeals ultimately concluded that the legislative history did not lend any support to the Petitioner's interpretation of the statute. *Id.* at 6a-7a. Consequently, the court of appeals erroneously disregarded the express language and purpose of the Act, and by upholding the Secretary's interpretation of the exemption, frustrated Congress' intent. As best stated by the Eighth Circuit, "[c]ertainly, there is no worse statute than one misunderstood by those who interpret it." *Barthel v. United States Department of Agriculture*, 181 F.3d 934, 937 (8th Cir. 1999).

1. The court of appeals mischaracterized the general purpose of the Food Security Act of 1985 as only preserving those wetlands characteristics still in existence in 1985 from agricultural production. App. A, *infra*, 5a. The court of appeals cited no authority for its limited characterization of the purpose of the statute. Indeed, the statute expressly exempts those wetlands which were converted before the enactment of the statute, demonstrating a clear purpose to "grandfather" prior converted wetlands used for agricultural production prior to 1985. 16 U.S.C. §§ 3822(b)(1)(A), (b)(1)(G), and (b)(2)(D) (Supp. IV 1998); H.R. Rep. No. 99-271, pt. 1, at 416, 419, 99th Cong. (1st Sess. 1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1520-23 (statements by Rep. Daschle that if agricultural production occurred at any time in the past, the land would be grandfathered as of the date of the bill's enactment into law).[5] Congress expressly recognized that certain exemptions were required for a reasonable and fair implementation of the provisions of Swampbuster. H.R. Rep. No. 99-271, pt. 1, at 88, 99th Cong. (1st Sess. 1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1189.

Moreover, the Food Security Act of 1985 was derived from a desire to bolster a failing agricultural economy:

> The purpose of this bill is simple. It is to provide, as far as it can be done in legislation of this kind,

---

[5] The court of appeals misunderstood the importance of Rep. Daschle's statements which were contemporaneous with the enactment of the Food Security Act of 1985. App. A, *infra*, 5a-6a. Even though Rep. Daschle's statements were made long before the enactment of the exemption at issue herein, his statements indicate Congress' intent to exempt all prior converted wetlands from the provisions of Swampbuster. The 1996 amendments, while not contemporaneous with Rep. Daschle's statements, provide further evidence of Congress' original intent in 1985.

> the basis for an economic climate in which efficient American family farmers can survive the grim squeeze that has already driven too many of them to or close to the brink of ruin.

H.R. Rep. No. 99-271, pt. 1, at 8, 99th Cong. (1st Sess. 1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1111. It is clear that Congress enacted the Food Security Act in an effort to protect our Nation's largest and most basic industry. *Id.* at 1111-12. Congress was concerned about the implications to the national economy if segments of the agricultural economy were permitted to collapse. *Id.* at 1111. The Food Security Act of 1985 addressed not only the conservation of our Nation's highly erodible lands and wetlands, but established and continued significant price support programs for producers who grow sugar, dairy, wool, wheat, cotton, rice, peanuts, and soybeans. *Id.* at 1113-79.

The legislative history demonstrates that the primary purpose of the Food Security Act of 1985 was, as the name implies, to secure a market oriented climate for the production of our Nation's food and fiber by providing economic security to our Nation's farmers. Congress chose to balance this effort with a conservation ethic that protects wetlands, but not at the expense of prior farming practices. Congress made a policy decision to "grandfather" prior converted wetlands – a policy decision which has been subverted by a new definition promulgated by the agency, and upheld by the court of appeals, which undermines the statute's general purpose. Where the intent of Congress is clear, as it is here, it governs. *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, 955 F.2d 1199, 1204 (8th Cir. 1992), *citing Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

2. Moreover, the 1990 and 1996 amendments to the Food Security Act did not alter the Act's general purpose, or provide an increased emphasis on the preservation of wetlands. For instance, the Food, Agriculture, Conservation, and Trade Act of 1990 was enacted in order to extend and revise agricultural support programs, to provide for agricultural export programs, to ensure consumers an abundance of food and fiber at reasonable prices, and to provide for resource conservation. Pub. L. No. 101-624, 104 Stat. 3359 (November 28, 1990). The Federal Agriculture Improvement and Reform Act of 1996 was intended to modify the operation of certain agricultural programs. Pub. L. No. 104-127, 110 Stat. 888 (April 4, 1996). Neither amendment sought to undermine Congress' initial decision to exempt prior converted wetlands from the provisions of Swampbuster.

3. In fact, in 1996, the prohibitions under Swampbuster were relaxed in order to provide greater flexibility to farmers who lawfully converted their wetlands prior to the enactment of the Food Security Act in 1985. The Federal Agriculture Improvement and Reform Act of 1996 expanded the list of statutory exemptions to agricultural program ineligibility. Pub. L. No. 104-127, § 322(b), 110 Stat. 888, 988-89 (April 4, 1996) (codified at 16 U.S.C. §§ 3822(b)(1)(G), (b)(2)(D) (Supp. IV 1998)); *supra*, see discussion at p. 4. The particular exemption at issue authorized the re-conversion of a prior lawfully converted wetland, where wetland characteristics returned to the site due to a lack of drainage maintenance or circumstances beyond the control of the property owner. 16 U.S.C. §§ 3822(b)(1)(G), (b)(2)(D) (Supp. IV 1998). This amendment, enacted in 1996, provides additional evidence of Congress' statutory scheme – Congress intended all drained, dredged, filled, leveled, or otherwise manipulated wetlands to be exempt from agricultural production ineligibility, so long as the original

manipulation of the wetlands occurred prior to December 23, 1985.

The court of appeals upheld the USDA's contention that the wetlands at issue herein were not "prior converted wetlands" as of December 23, 1985, because wetland characteristics had returned to the site. The court of appeals' determination was erroneous for two reasons. First and foremost, the 1996 amendments provide that any previously converted sites, which are or have returned to wetland characteristics, will remain exempted from ineligibility. Second, the determination of the USDA is not one Congress would have sanctioned, and thus, frustrates Congress' intent. 16 U.S.C. §§ 3822(b)(1)(G), (b)(2)(D) (Supp. IV 1998). The USDA's determination, upheld by the court of appeals, effectively negates the prior converted wetland exemption that Congress clearly and unequivocally granted farmers like Mr. Horn, whose land was manipulated, converted, and farmed prior to 1985.

III. REVIEW BY THIS COURT IS WARRANTED TO CLARIFY LIMITATIONS ON CONGRESS' SPENDING POWER TO CONDITION THE RECEIPT OF FEDERAL FUNDS BASED UPON COMPELLED COMPLIANCE WITH A STATUTORY SCHEME

Despite the recognition that federal funds are considered a "gift" from Congress that it was under no obligation to give, *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board*, 527 U.S. 666, 686-87 (1999) and *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923), Congress' spending power is not without limitations. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); and *New York v. United States*, 505 U.S. 144, 167 (1992). This Court notably established that "in some circumstances the

financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211; *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937) (noting that "the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact."). Consequently, Congress may not condition the receipt of federal funds in such a manner as to leave the recipient with no practical alternative, other than complying with the Federal directives. *College Savings Bank v. Florida Prepaid Post Secondary Education Expenses Board*, 527 U.S. at 687.

Review by this Court is especially warranted, because the circuit courts, including the Seventh Circuit below, have either declined the opportunity to develop a workable standard for detecting unconstitutional coercion, or refused to acknowledge the viability and application of the coercion theory altogether, often characterizing it as an "uphill battle." App. B, *infra*, 37a; App. A, *infra*, 7a-8a; *State of Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989); *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981); *Mich. Dep't of State v. United States*, 166 F.Supp.2d 1228, 1233-34 (W.D. Mich. 2001); *Kansas v. United States*, 24 F.Supp.2d 1192, 1196 (D. Kan. 1998), *aff'd*, 214 F.3d 1196 (10th Cir. 2000); and Chemerinsky, Erwin, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 103 (2001). Clarification of Congress' spending authority to compel compliance with a statutory scheme is much needed, for no other reason than the fact that the district court below concluded that "the Swampbuster provisions are coercive, in fact, they give the USDA a big club with which to protect wetlands." App. B, *infra*, 37a. Yet, the district court refused to hold the provisions of Swampbuster unconstitutional. *Ibid.*

1. Congress has conditioned the receipt of certain farm subsidies in such a manner (*i.e.*, the potential loss of *100%* of USDA benefits) as to leave the recipient, such as the Petitioner and others, with no practical alternative other than complying with the regulation of their private property in order to prevent the further loss of wetlands for the production of agricultural commodities. The Food Security Act encompasses "a coercive federal regulatory scheme under which Congress may, through the guise of its spending power, indirectly regulate the use of private property that it is unable to regulate under its constitutionally enumerated powers." Douglas, Patrick R., *Conservation or Coercion: Federal Regulation of Intrastate Wetlands Under the Swampbuster Provisions of the Food Security Act*, 8 MO. ENVTL. L & POL'Y REV. 59, 59 (2001).

Similar to the Court's concerns in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, what Congress threatens if the farmer refuses to agree to its conditions is not the denial of a gift or gratuity, "but a sanction: exclusion of the [individual] from otherwise permissible activity." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. at 687; *United States v. Dierckman*, 201 F.3d 915, 927 (7th Cir. 2000) (characterizing the termination of eligibility pursuant to the Food Security Act as a "penalty" and "sanction" for improperly converting wetlands); *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, 955 F.2d 1199, 1204 (8th Cir. 1992) (sanction); *Horn Farms, Inc. v. Veneman*, 319 F.Supp.2d 902, 909 (N.D. Ind. 2004) (penalty); *B&D Land and Livestock, Co. v. Veneman*, 231 F.Supp.2d 895, 906 (N.D. Iowa 2002) (penalty); H.R. Rep. No. 99-271, pt. 1, at 88, 99th Cong. (1st Sess. 1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1189 (sanction). Accordingly, the point of coercion is automatically passed when what is attached to the refusal to abide

by the conditions of receipt of the funding is a penalty, sanction, or the exclusion from otherwise lawful activity. *Ibid.* The loss of *100%* of eligibility in USDA-related programs can be characterized not as the denial of a gift or gratuity, but only as a coercive or punitive measure, which remains attached to both the Petitioner and his private property in perpetuity.

Its bears noting that while the farmer is forever excluded from receiving agricultural subsidies from the USDA for violating the provisions of Swampbuster, *id.* at 64a-65a, his private property is similarly subject to the broad curtailment of certain rights and uses by the farmer's successors-in-interest. The production of an agricultural commodity in a converted wetland, without the attendant loss of agricultural subsidies, is strictly prohibited by any successor-in-interest, even those wholly innocent of the actual unlawful conversion. Such a determination has a significant adverse impact on the fair market value of farmland in rural communities. Maintaining sufficient productive cropland and/or forage areas on farmland is unavoidable for the property to remain marketable for agricultural production purposes. 136 Cong. Rec. H11029, 11345 (daily ed. Oct. 22, 1990) (statement of Rep. De La Garza). Under such circumstances, the provisions of Swampbuster obviously were not intended to be a condition on the receipt of a gratuitous benefit, but rather, were intended to *penalize* individuals for the unlawful conversion of wetlands.

Recipients of USDA-related funding are forced to choose between two equally coercive alternatives: the recipient must either submit to Federal regulation of their private property by opting not to use wetlands on their property for agricultural use, even those that were prior converted, or lose *100%* of their USDA benefits. Under Swampbuster, the range of alternatives is unacceptably

narrow. *New York v. United States*, 505 U.S. 144, 176-77 (1992).

2. In *United States v. Butler*, 297 U.S. 1 (1936), certain provisions of the Agricultural Adjustment Act of 1933 were determined to exceed Congress's enumerated authority under the Constitution. *United States v. Butler*, 297 U.S. 1, 62-78 (1936). Even though the Court held the challenged legislation invalid as a violation of the Tenth Amendment, rather than the Spending Clause, the Court also determined that the challenged legislation constituted impermissible coercion under the Spending Clause. *Id.* at 70-74. Importantly, the Court stated that "[t]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced." *Id.* at 73.[6] Swampbuster clearly involves the latter and not the former.

The Court in *Butler* colorfully defined "impermissible coercion" as "an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." *United States v. Butler*, 297 U.S. at 72, *quoting Frost v. Railroad Commission of the State of California*, 271 U.S. 583, 593 (1926).[7]

---

[6] In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 171-74 (2001), this Court held that federal authority over wholly intrastate wetlands raises "significant constitutional questions."

[7] In *Frost*, Justice Sutherland explained that:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

(Continued on following page)

"While *Butler's* authority is questionable insofar as it assumes that Congress has no regulatory power over farm production, its discussion of the spending power and its description of both the power's breadth and its limitations remain sound." *South Dakota v. Dole*, 483 U.S. 203, 216-17 (1987) (O'Connor, J., dissenting). In fact, Justice O'Connor has interpreted the Spending Clause to afford Congress no authority "to impose requirements on a grant that go beyond specifying how the money should be spent," unless the condition "falls within one of Congress' delegated regulatory powers." *Id.* at 216 (citation omitted).

With regard to the termination of agricultural benefits in *Butler*, the Court determined that the processing tax coerced farmers in complying with an acreage reduction scheme. *United States v. Butler*, 297 U.S. at 69-73. In support of this conclusion, the Court stated that:

> The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold *unlimited benefits* is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well to financial ruin. . . . This is coercion by economic pressure. The asserted power of choice is illusory.

United States v. Butler, 297 U.S. at 70-71 (emphasis added). Similar to the Court's opinion in *Butler*, pertaining to the Agricultural Adjustment Act of 1933, and Justice

---

Frost v. Railroad Commission of the State of California, 271 U.S. 583, 593 (1926).

O'Connor's dissenting opinion in *South Dakota v. Dole*, pertaining to the National Minimum Drinking Age Amendment, the provisions of Swampbuster clearly encompass an exercise of regulatory, not spending, authority. Swampbuster does not create a spending program; it merely imposes a penalty – the loss of federal funding.

The wetland conservation provisions are impermissibly coercive, because the potential loss of an individual's entire eligibility is intended to be sufficient to exert pressure on him to agree to the proposed regulation of his private property.[8] The Federal Government has, in an act more akin to forbidden regulation than to permissible condition, supplanted with its own policy preferences the considered judgments of the States, such as to how best to preserve the functions and values of wetlands located entirely within their respective borders.

3. It is not surprising that in the aftermath of *South Dakota v. Dole*, lower courts have been called upon to limit the spending authority of Congress based upon the coercion theory. The courts of appeals have disagreed whether the coercion theory remains a viable means of limiting Congress' spending power. The United States Court of Appeals for the Eighth Circuit, in *Bradley v. Arkansas Department of Education*, 189 F.3d 745 (8th Cir. 1999), held that the section of the Federal Rehabilitation Act requiring Arkansas to waive its Eleventh Amendment immunity to all claims arising under the Rehabilitation Act, if it receives Federal funding, amounted to impermissible coercion. *Bradley v. Arkansas Department of Education*, 189 F.3d

[8] To be sure, the wetland conservation provisions constitute far more than a "temptation" or "mild encouragement." The wetland conservation provisions are impermissibly coercive, because they authorize *100%* ineligibility in certain USDA-related programs.

745, 757-58 (8th Cir. 1999). The Eighth Circuit concluded that the "condition § 504 imposes on recipients of federal funds exceeds the ordinary quid pro quo involved in a proper exercise of Congress's spending power." *Ibid.* (citation omitted). However, the Eighth Circuit panel's decision was reversed on rehearing *en banc*. *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (*en banc*). The court in *Jim C. v. United States*, was unpersuaded that the loss of twelve percent in education-related funding compelled Arkansas' choice. *Id.* at 1082.

Similarly, other courts have held that the loss of Federal funding at issue, on the grounds that the recipients refused to fulfill their Federal obligations in some insubstantial respect, did not deprive the recipients of any meaningful choice or amount to impermissible coercion. *Doe v. State of Nebraska*, 345 F.3d 593, 598-600 (8th Cir. 2003); *Kansas v. United States*, 214 F.3d at 1201-02; *State of California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997); and *State of Nevada v. Skinner*, 884 F.2d at 449-50.

Importantly, however, "while most courts faced with the question have effectively abandoned any real effort to apply the coercion theory," some courts do not view the coercion theory with such suspicion. *West Virginia v. United States Department of Health and Human Services*, 289 F.3d 281, 287-91 (4th Cir. 2002); *Commonwealth of Virginia, Department of Education v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997) (*en banc*) (stating that the Federal Government's withholding from the Commonwealth of *100%* of an annual special education grant, because of the Commonwealth's failure to abide by certain conditions, "resembles impermissible coercion."); and *United States v. Sabri*, 183 F.Supp.2d 1145, 1156 (D. Minn. 2002) (concluding that two local governments' decisions to either abide by certain funding conditions, or forego approximately 99.97% and 99.96% of their federal funds, respectively,

surely is "so coercive as to pass the point at which pressure turns into compulsion.").[9] At the very least, the coercion theory remains viable in the Fourth Circuit. *Id.* at 291. According to the Fourth Circuit, "federal statutes that threaten the loss of an entire block of federal funds upon a relatively minor failing by a [recipient] are constitutionally suspect." *Id.*[10]

Had the Petitioner's wetlands been located within the Fourth Circuit, the result in this case may certainly have been different. The Fourth Circuit may have brought more credibility to the Petitioner's argument that the wetland conservation provisions are impermissibly coercive, because the Food Security Act, as amended, confers the power to withhold *unlimited benefits* from agricultural producers unwilling or unable to comply with the wetland conservation provisions. This Court should not tolerate a circuit split on an issue as important as the scope and limitation of Congress' spending authority.

4. Furthermore, each of the above cases involve conditional Federal spending which arguably interferes

---

[9] The court's decision in *United States v. Sabri* was reversed on appeal, because the Eighth Circuit determined that the statute at issue did not actually condition the receipt of federal funds. *United States v. Sabri*, 326 F.3d 937, 945-48 (8th Cir. 2003). The Eighth Circuit concluded, therefore, that since the statute did not qualify as a conditional-grant statute, the spending limitations set forth in *South Dakota v. Dole* did not apply. *Id.* at 948.

[10] The Fourth Circuit, in *West Virginia v. United States Department of Health and Human Services*, ultimately held that the Federal requirements that states adopt an estate recovery program, or lose all or part of their Federal Medicaid reimbursements, were *not* impermissibly coercive, because the government threatened to withhold *"all or part"* of West Virginia's Federal financial participation in the State's Medicaid Program. *West Virginia v. United States Department of Health and Human Services*, 289 F.3d at 291-92.

with a state's autonomy. In this case, the Petitioner does not represent a sovereign community, but rather is an individual. A state possesses political powers, particularly the power to tax, that "help ensure the federal government does not 'coerce' the state through economic 'encouragement.'" *A.W. v. The Jersey City Public Schools*, 341 F.3d 234, 243-44 (3rd Cir. 2003), *quoting Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 174 (3rd Cir. 2002). "An individual citizen, in contrast, lacks these formidable institutional resources." *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d at 174. An individual's refusal of conditional money is an unsatisfactory choice "in light of growing dependence of recipients on federal money." Zietlow, Rebecca E., *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 172 n.206 (2002).

Consequently, "the states are sufficiently strong to resist the blandishments of federal money, while private individuals and institutions tend not to be." Baker, Lynn A., *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1957 n.16 (1995) (citation omitted). "[P]olitical self-help by [individuals] is less feasible when majorities seek to curtail civil liberties than when Congress goes beyond its enumerated powers or interferes with the autonomy of state or local government." *Ibid.* Moreover, the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).[11]

---

[11] In addition to their private property rights, individuals have a constitutionally protected property interest in statutory entitlements, such as agricultural subsidies, for persons qualified to receive them. *Atkins v. Parker*, 472 U.S. 115, 128 (1985); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Board of Regents of State Colleges v. Roth*, 408

(Continued on following page)

5. Finally, it is appropriate to resolve the issue at this time, because the Seventh Circuit's refusal to studiously consider these arguments renders meaningless this Court's acknowledgment that a person has the right to be free from unauthorized actions of government officials which substantially impair his or her property rights. *Greene v. McElroy*, 360 U.S. 474, 492-93 (1959). If the right to unrestricted use and enjoyment of one's property, and the right to be free from governmental interference, are in fact private interests of historic and continuing importance, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993), then the Petitioner is entitled to a more exacting scrutiny of Congress' encroachment into the Petitioner's "privilege of use," than that provided by either the district court or the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KAREN BUDD-FALEN
Counsel of Record
BRANDON L. JENSEN
BUDD-FALEN LAW OFFICES, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, Wyoming 82001
(307) 632-5105

Counsel for Petitioner

April 2005

U.S. 564, 577-78 (1972); and *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970).

SUPREME COURT APPENDIX

Page

Appendix A (7th Circuit Decision) 1a
397 F.3d 472 (7th Cir. 2005)

Appendix B (District Court Decision) 12a
319 F.Supp.2d 902 (N.D. Ind. 2004)

Appendix C (Administrative Decisions)
NRCS Preliminary Technical Determination 53a

Wetland Conservation Determination; Tract No. 13599 ..... 56a

Assistance Notes; Tract No. 13599 ..... 59a

Wetland Conservation Determination; Tract No. 980 ..... 60a

Assistance Notes; Tract No. 980 ..... 63a

NRCS Non-Agricultural Determination 64a

NRCS Final Technical Determination 67a

Map of all involved Tracts 70a

Wetland Conservation Determination; Tract No. 781 ..... 71a

Wetland Determination Designation Map; Tract No. 781 ..... 72a

Wetland Conservation Determination; Tract No. 13598 ..... 73a

Wetland Determination Designation Map; Tract No. 13598 ..... 74a

Wetland Conservation Determination; Tract No. 13599 ..... 75a

Wetland Determination Designation Map; Tract No. 13599 ..... 76a

SUPREME COURT APPENDIX – Continued

Wetland Conservation Determination; Tract No. 980 ..... 77a

Wetland Determination Designation Map; Tract No. 980 ..... 78a

Definitions of Wetland Label Codes 79a

Farm Service Agency Decision 81a

FSA Fulton County Committee Decision 84a

Hearing Officer's Preliminary Decision 86a

Hearing Officer's Final Decision 90a

Denial of a Director Review Request 94a

Second Denial of a Director Review Request 96a

Appendix D (NRCS Field Notes) 99a

Appendix E (United States Code)

16 U.S.C. § 3821 (Supp. III. 1985) 101a

16 U.S.C. § 3822(a) (Supp. III 1985) 102a

16 U.S.C. § 3821 (Supp. II 1990) 103a

16 U.S.C. § 3822(b) (Supp. II 1990) 105a

16 U.S.C. § 3821 (Supp. IV 1998) 106a

16 U.S.C. § 3822(b) (Supp. IV 1998) 108a

Appendix F (Code of Federal Regulations)

7 C.F.R. § 12.1 (1999) 113a

7 C.F.R. § 12.2 (1999) 114a

7 C.F.R. § 12.3 (1999) 122a

7 C.F.R. §§ 12.4(a), (c), (g), (h) (1999) 123a

7 C.F.R. § 12.5(b) (1999) 126a

7 C.F.R. § 12.33 (1996) 135a

APPENDIX A

In the

United States Court of Appeals

for the Seventh Circuit

Nos. 04-2948, 04-2909.

HORN FARMS, INC.,

Plaintiff-Appellee,
Cross-Appellant,

v.

MIKE JOHANNS, Secretary of Agriculture, et al.,

Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 3:02 CV-0831 AS – **Allen Sharp**, *Judge.*

ARGUED JANUARY 3, 2005 – DECIDED FEBRUARY 2, 2005

Before BAUER, EASTERBROOK, and WOOD, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Farmers who convert wetlands to agricultural use lose eligibility for federal agricultural subsidies. The initial version of this statute, 16 U.S.C. §§ 3821-24, enacted in 1985 and dubbed "Swampbuster," made the loss proportional to the amount of wetland converted. An amendment in 1990 provided

that converting *any* wetland would cause the farmer to lose *all* agricultural payments. A further amendment in 1996 added an exception for wetlands that had been drained and farmed, had reverted to wetland status, and then were restored to agricultural use. We must interpret and apply the 1996 exception.

In 1998 Horn Farms drained about 6.2 acres of wetlands. A system of tiles under that ground showed that this was not its first conversion to farm use, but well before 1998 the system had broken down and the parcel had reverted to wetland. The district conservationist concluded, from the age of trees and other vegetation, that the ground probably had become saturated again during the 1970s, and certainly no later than 1981. This led local agricultural officials to deem Horn Farms ineligible for the exception, which covers: "A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date as a result of – (i) the lack of maintenance of drainage, dikes, levees, or similar structures; (ii) a lack of management of the lands containing the wetland; or (iii) circumstances beyond the control of the person." 16 U.S.C. § 3822(b)(2)(D). The date on which the ground "returned to wetland status" could not be determined with certainty, but it preceded December 23, 1985 – so much Horn Farms concedes. Because the Department of Agriculture reads the phrase "after that date" to refer to December 23, 1985, its immediate antecedent, Horn Farms was ineligible for the exception and lost all federal agricultural subsidies. (The statute restores the subsidies if the farmer restores the wetlands, but Horn Farms has declined to do this, and

the parties could not agree on the adequacy of its offer to mitigate the loss in other ways. *See* 16 U.S.C. § 3822(i).)

Horn Farms contends that "that date" is the date of the original conversion, so that any wetland converted to farm use before December 23, 1985, always may be farmed again without any loss of federal subsidy, no matter how long it had been a wetland before the second conversion and no matter what its status *on* December 23, 1985. A federal district court agreed with this position and directed the Department to resume Horn Farms' subsidy payments. 319 F. Supp. 2d 902 (N.D. Ind. 2004). The judge rejected Horn Farms' request that he declare the legislation unconstitutional as a misuse of Congress' spending power, so Horn Farms remains at risk of losing federal support again if it converts any wetland that had not been drained and farmed some time before December 23, 1985. Both sides have appealed; the Department of Agriculture also asks us to review two other parts of the district court's opinion that we describe later.

Because the district court remanded to the Secretary, we must consider whether the judgment is appealable as a "final decision" under 28 U.S.C. § 1291. It is not clear what the Secretary is supposed to do on remand; the judgment omits all details. The remand appears to be the result of careless drafting. The district court did not want the Department of Agriculture to take more evidence and make a fresh decision; instead the court contemplated that the Department would restore Horn Farms' subsidy. Yet if by ordering a remand rather than a concrete remedy the judge has made his decision non-final, an appeal is impermissible – though an application under Fed. R. Civ. P. 60(a) might be in order to conform the disposition to the opinion's rationale. Given the rationale of *Sullivan v.*

Finkelstein, 496 U.S. 617 (1990), and *Forney v. Apfel*, 524 U.S. 266 (1998), however, the order is a "final decision" as it stands. Nothing that the Secretary could do in the future would lead to a fresh administrative order that the federal government could take back to district court (and this independent of the fact that the Department cannot petition for judicial review of its own orders). It is thus now or never for an appeal. Although *Finkelstein* and *Forney* concerned a provision in the Social Security act rather than § 1291, we applied them to § 1291 in *Perlman v. Swiss Bank Corp.*, 195 F.3d 975, 979 (7th Cir. 1999): "If the district court finds that the decision was erroneous and enters a judgment wrapping up the litigation, that decision is appealable even if extra-judicial proceedings lie ahead; but if the court postpones adjudication until after additional evidence has been analyzed, then it has not made a final decision." The district court concluded that the Secretary's decision was erroneous and awarded Horn Farms all financial relief that it sought, so the order is appealable now.

Section 3822(b)(2)(D) is ambiguous. The referent of "that date" could be December 23, 1985, as the Secretary contends, but it also could be the date on which the wetland was "previously identified" or the date on which the "original conversion . . . was commenced". Several contextual elements support the Secretary's reading. First, December 23, 1985, is the last antecedent of "that date". *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Second, the date on which a wetland was "previously identified" is meaningless for land converted before December 1985, as the statute's approach to "identifying" wetlands did not come into existence until then. Third, the date of original conversion is an implausible candidate for the antecedent,

because then the phrase "before that date" and much of the remaining language would serve no function. It would be as if the statute exempted: "A wetland converted before December 23, 1985, that the Secretary determines returned to wetland status after that date as a result of . . . ". Any reading that makes so much of a statute surplusage has little to recommend it. Fourth, when "that date" is understood to be December 23, 1985, the subsection is a non-degradation clause: the legislation protects wetlands as they actually existed on the date of its enactment, penalizing withdrawals without attempting to restore lands then under agricultural production. Reading "that date" to be the time of original conversion would allow net reductions in wetlands after the legislation's enactment – and would allow them in ways that are difficult to police, because there would be few records to show the date of original conversion, so farmers who drained wetlands after 1985 could make hard-to-refute claims that they were just going back to some long-forgotten state of affairs.

So the Secretary's interpretation not only is reasonable but also is the most sensible understanding of the legislation. Moreover, because the interpretation is expressed in regulations adopted after notice and opportunity for comment, *see* 7 C.F.R. §§ 12.2(7), 12.2(8), and concerns the Secretary's administration of a federal program, it receives all of the deference contemplated by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Yet the district court concluded that a solitary statement by one of the legislation's sponsors overrode all of this. The judge relied on an exchange that took place in the House Agriculture Committee and was summarized (though not reported verbatim) in the committee report:

> Mr. Daschle was recognized to offer a clarifying amendment to the previously adopted Swampbuster provisions. Mr. Daschle briefly explained the provisions of the amendment. Mr. Lewis offered an amendment to the amendment to clarify that the definition of wetlands would not include simply wet soils. Mr. Daschle said he would accept the amendment. The Committee agreed to the Lewis amendment by voice vote. Mr. Daschle and Mr. Lewis discussed the question of cropland that has been flooded and later reclaimed. Mr. Daschle stressed that the amendment would not affect the use of this land because if production was underway at any time in the past, the land would be grandfathered.

H.R. Rep. 99-271 (Pt. 1) at 419, 99th Cong. 1st Sess. (1985). This implies that Rep. Daschle thought that the version of the statute under consideration in 1985 allowed previously converted wetlands to be re-converted later without penalty. What that has to do with the interpretation of an amendment 11 years later is a mystery. The 1985 legislation lacked any counterpart to § 3822(b)(2)(D); Rep. Daschle could not have been trying to pin down the antecedent of "that date" in a bill whose drafting lay far in the future. The district judge also did not explain why one representative's view would trump that of the Cabinet official to whom administration has been delegated. If agencies and legislators read ambiguous language differently, the agency wins under *Chevron*. When Congress delegates to the Executive Branch a power of interpretation, it surrenders any opportunity to rule the outcome via statements in committee. *See*, e.g., *American Hospital Ass'n v. NLRB*, 499 U.S. 606 (1991). Cf. *United States v. Mead Corp.*, 533 U.S. 218 (2001). Thus the Secretary's reading would prevail even had the statement been

contemporaneous with the statute's enactment. Cf. *Continental Can Co. v. Chicago Truck Drivers Pension Fund*, 916 F.2d 1154 (7th Cir. 1990).

This conclusion brings to the fore Horn Farms' contention that Congress lacks authority to make subsidies contingent on preserving wetlands. Such a tie between the agricultural subsidy and leaving wetlands alone is impermissibly coercive, Horn Farms insists, and oversteps Congress' authority under Article I § 8 cl. 1 of the Constitution. He relies principally on Justice O'Connor's conclusion in *South Dakota v. Dole*, 483 U.S. 203, 212-18 (1987) (dissenting opinion), that the spending power may not be used in a way that coerces states to surrender fundamental attributes of their sovereignty. Beyond the fact that Justice O'Connor wrote for herself alone is the fact that Horn Farms is not a governmental body and lacks any sovereignty that can be trampled upon. Anyway, if it is unduly "coercive" to link agricultural subsidies to how the farmer uses (or misuses) agricultural land, it must be unduly "coercive" to link the subsidy to the agricultural product. A farmer can't get federal payments for growing (or not growing) soybeans, without actually growing the soybeans or allowing the land to lie fallow. The sort of argument Horn Farms presses would demolish, not the Swampbuster legislation, but the whole system of agricultural subsidies, and indeed all federal legislation (including tax credits and deductions) linking financial rewards to the satisfaction of conditions. Horn Farms could not gain from such a decision.

The majority in *South Dakota* identified three potential limitations on the spending power: conditions set on expenditures must (i) promote the general welfare, (ii) be unambiguous (at least when they affect states), and (iii)

relate to a legitimate federal interest. 483 U.S. at 207-08. The first and third of these come to the same thing and don't help Horn Farms, which does not deny that preservation of wetlands (which support migratory birds and other wildlife) promotes a legitimate federal interest and thus a plausible conception of the general welfare – a subject on which the legislature's assessment is all but conclusive. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). As for the second: the statute is as clear as can be. Even the scholars most skeptical of Congress' use of conditional spending to achieve substantive goals would not think this legislation problematic. *See* Laurence Claus, *"Uniform Throughout the United States": Limits on Taxing as Limits on Spending*, 18 Const. Commentary 517 (2001); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911 (1995). No surprise, then, that we thought this legislation to be within national power the last time it was challenged. *See United States v. Dierckman*, 201 F.3d 915, 922-23 (7th Cir. 2000). Horn Farms developed the conditional-spending point more fully than did the parties in *Dierckman* (our treatment there was correspondingly succinct), but a more elaborate argument does not affect our resolution. This makes it unnecessary to determine whether the legislation could be supported at any event by the national commerce power. *See Wickard v. Filburn*, 317 U.S. 111 (1942).

What we have said so far fully resolves the parties' disputes. But the district court went further; actually the district court *began* with a constitutional decision that did not affect its judgment. The district court stated that the Swampbuster legislation offends the due process clause of the fifth amendment because it does not afford farmers adequate opportunities for administrative review of the

district conservationist's conclusion that particular wetlands had been converted to farm use on particular dates. 319 F. Supp. 2d at 912-16. The judge did not explain why he considered a constitutional issue first, when challenges to statutes' validity should be entertained only as a last resort. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985); *ISI International, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001). As the judge later determined that the dates of conversion, reversion, and reconversion do not matter (provided that the original conversion occurred before December 23, 1985), it was unnecessary, on his understanding of § 3822(b)(2)(D), to consider the adequacy of the procedures used to determine those dates. Constitutional adjudication is unnecessary on our view of that statute as well: the timing question is whether the converted ground was a wetland on December 23, 1985. This, too, is uncontested. So the agency did not need to offer Horn Farms *any* procedures to find facts, for there were no material disputes. A hearing was no more essential before the agency than it was in the district court – which granted summary judgment without offering an evidentiary hearing. So we let the due process issue pass without further analysis. The Secretary contends that the district judge misunderstood how state and federal agencies determine contested factual issues under the Swampbuster legislation, but this topic we need not explore. It is enough to say that the district court's constitutional analysis in this litigation lacks any precedential force.

At the close of its opinion, the district judge stated that the Secretary's removal of Horn Farms' subsidy violated 5 U.S.C. § 558, a part of the Administrative Procedure Act, because it deprived Horn Farms of a "license" without the procedures required by that subsection. 319 F. Supp. 2d

at 921-23. On the district court's view this was irrelevant, because Horn Farms is entitled to prevail independent of any procedural shortcomings. Moreover, the district court's understanding of § 558 made its constitutional ruling doubly gratuitous, because the court purported to invalidate a set of procedures that, given its conclusion about § 558, did not apply to Horn Farms in the first place. Because we have sided with the Secretary on substance, however, § 558 might offer an alternative ground for relief – if not an award of the subsidy that Horn Farms wants, at least for a remand at which it would be given an "opportunity to demonstrate or achieve compliance with all lawful requirements." 5 U.S.C. § 558(c)(2).

It is not clear to us that Horn Farms wants that opportunity, which would mean a chance to turn the 6.2 acres back into wetlands. Since the Swampbuster legislation itself offers that opportunity, *see* 16 U.S.C. § 3822(i), which Horn Farms spurned, it is hard to see what role § 558 could serve. But, just in case, we add that the district judge's understanding of § 558 is mistaken. It deals with procedures to be followed in connection with any "application . . . for a license required by law". Horn Farms did not "apply" for a "license." It wants a check drawn on the Treasury, not a license – for it does not need any federal official's permission under Swampbuster either to engage in farming or to drain wetlands. It is free to do as much of either as it wants (subject to other legal constraints). Procedures to be used for resolving disputes about whether land was wetlands, and when conversions occurred, are provided in the Swampbuster legislation and the implementing regulations, independent of the APA.

That a farmer's acts have financial consequences no more makes a subsidy a "license" than it would make sense

to say that, because a taxpayer cannot claim the child-care credit without actually having a child, the United States has established a "licensing" requirement to bear or raise children. Similarly the fact that a mortgage-interest deduction becomes unavailable if the IRS concludes that the taxpayer no longer has a mortgage does not mean that one needs a license to borrow money on the security of real estate. Doubtless § 558 should be read so that it encompasses all situations in which federal approval is required to undertake some act – even if the document is called a "permit" or "certificate of public interest, convenience, and necessity" rather than a "license." *See* 5 U.S.C. § 551(8) (defining a "license" as "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission"); *see* also, e.g., *Bullwinkel v. Department of Transportation*, 787 F.2d 254, 256 (7th Cir. 1986) (pilots' medical certificates); *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1072 n.5 (7th Cir. 1982) ("term special permits" required to import certain merchandise); *Anchestegui v. Department of Agriculture*, 257 F.3d 1124, 1129 (9th Cir. 2001) (cattle grazing permit). But when no agency stands as a gatekeeper to a proposed private activity, there is no "license" either.

The judgment is reversed, and the case is remanded with instructions to enter judgment against Horn Farms.

A true Copy:

Teste:

/s/ _____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

HORN FARMS, INC.,	)	
Plaintiff,	)	**Cause No. 3:02 CV-0831 AS**
v.	)	
ANN M. VENEMAN, Secretary, U.S. Department of Agriculture, et. al	)	
Defendants.	)	

MEMORANDUM AND ORDER

This cause is before the Court on cross motions for summary judgment. The Plaintiffs brought suit under the Administrative Procedures Act, asking this Court to review the decision of the United States Department of Agriculture to terminate Horn Farms from a variety of farm subsidy programs. The parties have briefed the issues, and on March 3, 2004, this Court heard oral argument on the motions After considering the submissions of the parties and the oral arguments, the Court now rules as follows.

I. JURISDICTION

Jurisdiction is premised upon the Administrative Procedures Act (the "APA"), 5 U.S.C. §§ 706(1) & (2), which gives federal courts jurisdiction to review agency decisions, and federal question jurisdiction under 28 U.S.C. § 1331.

II. RELEVANT FACTS

The facts are not in dispute in this case. The Plaintiff, Horn Farms, Inc., ("Horn Farms") is owned and operated by Gene Horn, who currently owns and farms approximately 1400 acres in Fulton and Cass Counties in Indiana. Pl.'s Mem. in Supp. at 4. Some of this land was purchased in 1995, including the parcels at issue in this case. *Id.* at 5, n.4,6. The purchased land included several small tracts that the Natural Resources Conservation Service (the "NRCS") later determined to be wetlands. After noticing pieces of broken drain tiles in the area, and speaking with neighbors, Mr. Horn determined that these tracts had previously been farmed, but had reverted to wetlands through lack of maintenance of the drain tile system. Admin. R. at p. 6. Therefore, in 1998, he cleared several tracts and restored the drain tile system. *Id.*

Up to that time, Gene Horn and Horn Farms were eligible to participate in various farm subsidy programs administered by the United States Department of Agriculture (the "USDA") which allowed them to receive various loans and payments. *Id.* As part of the eligibility requirements for participation in these programs, a representative for Horn Farms executed Form AD-1026, agreeing not to grow crops on wetlands converted after 1985, and not to convert wetlands for the purpose of growing crops. Def.'s Mem. in Supp. at 1-2.

On January 28, 1999, Robert Baker, the operator of one of Plaintiff's farms, requested a wetland determination on certain property owned by Horn Farms. Pl.'s Mem. in Supp. at 2. On February 8, 1999, the Fulton County

Farm Service Agency[1] office (the "FSA") requested that the NRCS[2] conduct a wetland spot check on two tracts owned by Horn Farms: tract 3713; and tract 13599. Def.s' Mem. in Supp. at 2. On March 22, 1999, NRCS representative Albert Tinsley conducted a site-assessment with Mr. Horn present in order to evaluate the wetland areas in question. *Id.*; Pl.'s Mem. in Supp. at 5.

The results of Tinsley's field visit formed the basis for the NRCS's determination, and will therefore be included in some detail. His field notes state that according to slides reviewed, six of the areas he looked at had been in trees from prior to 1981, and that one site had growing cat-tails and rushes due to continuing inundation and saturation. Admin. R. at p. 75. He said that five sites bore evidence of being converted wetlands, with actual saturation in spite of the new tile system and risers installed. *Id.* They also had the remnants of wetland plants in the form of twigs, sticks and root wads, and in some places, surviving plants. *Id.*

Tinsley's notes state that he did observe evidence of past drainage, in the form of tile chips and broken pieces, but "since these areas were all in mature trees prior to

---

[1] The Farm Service Agency (FSA) was created in 1994 to replace the Agricultural Stabilization and Conservation Agency (the ASCS). *United States v. Dierckman*, 210 F.3d 915, 917, n.4 (7th Cir. 2000); *see also*, Public L. No. 103-354, § 226 (1994) (codified at 7 U.S.C. § 6932) and 60 Fed. Reg. 56,392 (Nov. 8, 1995) (changing the name of the newly created Consolidated Farm Service Agency to the Farm Service Agency).

[2] The NRCS was also created in 1994, and took over the services formerly provided by the Soil Conversation Service (the "SCS"). *See, Dierckman*, 201 F.3d at 917, n.3; and Pub. L. No. 103-354, § 246 (1994) (codified at 7 U.S.C. § 6962).

1981, there is no evidence that the drainage systems were actually working during or prior to 1981." *Id.* He says, "The chronology of this field appears to be that it was drained many decades ago, the system stopped functioning, trees had returned sometime no later than in the 1970's and were not suitable for a determination of PC [prior-converted wetland] during the pertinent 1981-1985 time frame for purposes of the Farm Bill provisions or the 1993-1998 time frame for purposes of the Clean Water Act." *Id.*

The NRCS reviewed the results from the onsite assessment and remote images and determined that some of the tracts in question were wetlands converted after November 28, 1990. Pl.'s Mem. in Supp. at 2; Def.s' Mem. in Supp. at 7. This is significant in terms of wetlands conversion because a new, more stringent version of the Swampbuster provisions went into effect on that date. The NRCS determined that four wetlands were converted on Tract No. 13599, consisting of 0.4, 0.5, 1.8, and 2.1 acres. *Id.* The NRCS noted that these wetlands had been cleared of trees and vegetation, and drainage tiles installed in order to facilitate the production of agricultural products, but that no farming activities had yet occurred in these areas. *Id.* In addition, the NRCS stated that one wetland had been converted on Tract No. 980, consisting of 1.4 acres, for a total of 6.2 acres of converted wetlands. *Id.*

Plaintiff Gene Horn was notified by letter on May 5, 1999, that the NRCS had made "a preliminary technical determination" that he had converted 6.2 acres of wetlands in violation of the Food Security Act of 1985, as amended by the Food, Agriculture, Conservation, and Trade Act of 1990, and the Federal Agricultural Improvement and Reform Act of 1996. Admin. R. at p. 72. The

letter informed Mr. Horn that the preliminary determination would become final within 30 days unless he appealed or asked for mediation. Admin. R. at pp. 72-3. On June 10, 1999, the FSA notified Mr. Horn that unless he took action to mitigate the loss of the converted wetlands, he would be ineligible for benefits under certain programs administered by the USDA. Def.'s Stmt. of Mat. Facts at 4.[3] Based on the preliminary technical determination, Mr. Horn's benefits were terminated beginning with the 1999 crop year, and he remains ineligible until he either restores the wetlands or mitigates their loss before January 1 of the subsequent crop year. *Id.*

Mr. Horn asked for mediation, but there was a substantial delay in getting the session scheduled because of difficulties in the office of the Indiana Commissioner of Agriculture. Def.s' Reply at 4. During this time, on January 31, 2000, Tinsley sent a letter to Mr. Horn explaining his options, that he could choose not to participate in the USDA farm support programs, or he could restore the converted wetlands in place. Admin. R. at p. 55.

When the mediation was finally held on March 28, 2001, the discussion was primarily about the options the agency could offer Horn Farms to get back into compliance so that it could regain eligibility for program benefits. Banks Aff. at p. 1. The mediation failed to produce an agreement. On May 16, 2001, Tinsley sent another letter to Mr. Horn explaining the steps he would need to take if

---

[3] The Defendant's factual statement says that this letter was sent, but there is no citation to the record. Although it is not required to do so, the Court has searched the record and is unable to find this letter. It is relevant on the issue of whether the Defendants offered the Plaintiff an opportunity to come into compliance before terminating his benefits.

he chose to mitigate the loss of the converted wetlands. Admin. R. at p. 502. Mr. Horn's understanding of the mitigation plan was that it required him to set apart possibly as much as 32 acres of farmland and turn it into a wetland to offset the loss of the 6.2 acres that he cleared. Pl.'s Mem. in Supp. at p. 6; Admin. R. at 128.[4] Mr. Horn found this mitigation plan unacceptable, primarily due to the discrepancy between the amount of wetlands converted and the amount of acreage potentially required for restoration and mitigation. *Id.*

On May 25, 2001, Mr. Horn proposed an alternative wetlands conservation plan. Admin. R. at p. 512-13. He offered to set aside and permanently protect 40 acres of wetlands on his remaining farmland properties, in addition to a reduction in support payments proportional to the amount of wetlands he converted to farm use. *Id.* As long as Mr. Horn remains out of the USDA's farm subsidy programs, he is not under the Swampbuster restrictions that prevent the conversion of wetlands to farm use. *Id.* The Record does not indicate that the agency considered Mr. Horn's proposal.

After the failure of the mediation process, Mr. Horn filed an appeal with the Farm Service Agency County Committee in Fulton County, Indiana, pursuant to C.F.R. Part 780. Pl.'s Mem. in Supp. at p. 7. He presented evidence to support the following claims: (1) that the six acres

[4] Tinsley's letter dated May 11, 2001, states that the Wetland Mitigation Ratio Key included in the record is only a sample, used as an example. Admin. R. at p. 126. Again, although it is not required to, the Court has searched the record and is unable to find anything that documents the amount of acreage Plaintiff would be required to put into a wetland in order to mitigate the loss of the 6.2 acres.

in question fell within an exception to the Act for "prior-converted wetlands"; (2) that NRCS did not make a determination on the "good faith" issue; (3) that the termination of all benefits was inappropriate; and (4) that ignoring his settlement proposal was contrary to the public interest. Def.'s Mem. in Supp. at p. 4; Admin. R. at pp. 217-224.

The County Committee held an informal hearing on October 17, 2001, regarding Mr. Horn's administrative appeal, and the next day, the Committee issued its decision. Pl.'s Mem. in Supp. at p. 7-8. The County Committee "determined that merit could not be found in regards to making a recommendation the NRCS technical determination be reviewed by the Indiana NRCS State Conservationist." *Id.* at 8; Def.s' Mem in Supp. at 5. In addition, the County Committee determined that they did not have authority to reverse a technical determination by the NRCS, and denied his appeal in its entirety. *Id.* The Committee advised Horn Farms of its appeal rights, and advised it that it would forward Horn Farm's Good Faith Determination Forms to NRCS for processing. Def.s' Mem. in Supp. at 5. The Committee advised that it lacked the authority to act on a settlement proposal, but that it could make a recommendation on the relief of penalties when the Good Faith Determination was returned by NRCS. *Id.*

Horn Farms appealed the Committee's decision and the underlying technical determination to the National Appeals Division, asking for a "record review". Pl.'s Mem. in Supp. at p. 8. The hearing officer, Michael E. Jacobs, issued a written decision stating that the National Appeals Division did not have subject-matter jurisdiction to conduct a record review because there exists "no authority to hold a hearing or review of the record on the denial of the Fulton County FSA Committee (COC) to seek a technical

review by the Indiana NRCS State Conservationist". *Id.*; Admin. R. at p. 272. He further stated that the NAD had no jurisdiction in this matter because "an appeal of the Fulton County Committee to not seek the NRCS State Conservationist to review the technical determination is of general applicability and policy." *Id.*

Horn Farms asked for reconsideration of this determination, which was denied, then sought review by the Director of the National Appeals Division. Pl.'s Mem. in Supp. at p. 8. Review was denied because Mr. Horn's appeal was signed by counsel, and the agency's rules required Mr. Horn to personally sign the request. *Id.* at 8-9. When he resubmitted his appeal, it was late. His request for reconsideration was also denied. *Id.* After exhausting his administrative appeals, Mr. Horn filed this suit on November 18, 2002.

III. THE STATUTORY AND REGULATORY SCHEME

The loss of wetlands is a matter of growing national concern. According to studies prepared by the United States Fish and Wildlife Service, Indiana experienced an 87% loss of wetlands between the 1780's and mid 1980's.[5] For the United States as a whole, the forty-eight conterminous states lost 53% of wetlands, with 2.5% of that loss

---

[5] Dahl. T.E.1990, *Wetlands, Losses in the United States 1780's to 1980's*, U.S. Fish and Wildlife Service, Washington, D.C., available at <http://www.npwrc.usgs.gov/resouce/othrdata/wetloss/wetloss.htm. This study is the first study in response to the Congressional requirement in the Emergency Wetlands Resources Act of 1986 that the Fish and Wildlife Service conduct status and trend studies and report the results to Congress every ten years. *Id.*

taking place between the mid-1970's and the mid-1980's.[6] During those ten years, the United States was losing wetlands at the rate of about 290,000 acres per year.[7] At the same time, the values of wetlands to human society have become better known and documented.[8]

To help with the problem of conserving wetlands, Congress included a provision in the Food Security Act of 1985 (the "FSA"), called the "Swampbuster" provision, that prohibits farmers who participate in USDA programs from converting wetlands and then producing an agricultural commodity on the converted wetlands. 16 U.S.C. § 3821(a) & (b). In 1990, Congress passed the Food, Agriculture, Conservation and Trade Act (FACTA), extending the

---

[6] *Id.*, Dahl, T.E., and C.E. Johnson, 1991, *Wetlands: Status and Trends in the Conterminous United States Mid-1970's to Mid-1980's*, U.S. Fish and Wildlife Service, Washington, D.C. This is the second of the two studies required by Congress to monitor the rate at which wetlands are disappearing. *Id.*

[7] The most recent study released by the Fish and Wildlife Service indicates that the rate of loss has slowed to about 58,000 acres per year, an 80% reduction in the rate of loss. Dahl, T.E., 2000, *Status and Trends of Wetlands in the Conterminous United States 1986 to 1997*, United States Fish and Wildlife Service. Washington, D.C.

[8] Congress stated, in enacting the provision, that wetlands are a priceless resource whose contributions have long gone unrecognized. Some of the benefits include wildlife habitat, flood control, water quality, groundwater recharge, and recreation. H.R. Rep. 99-271(l), codified at 1985 U.S.C.C.A.N. 1103, 1188. *See also*, Noss, Reed F., et al., *Endangered Ecosystems of the United States: A Preliminary Assessment of Loss and Degradation* (stating that the great interest in wetlands by conservationists and agencies is most likely related to the widely recognized valued of wetlands to human society: habitat for waterfowl and other game, nurseries for fishes, controllers of floods, cleansers of water, and many other services), *citing*, Tiner, R.W., 1984, *Wetlands of the United States: Current Status and Recent Trends.*, U.S. Fish and Wildlife Service, Washington, D.C.

prohibition such that a violation occurs when a wetland is converted for agricultural use, even if an agricultural commodity has not actually been produced. 16 U.S.C. § 3821(c). In addition, Congress added a stronger penalty for converting a wetland in the 1990 Statute. *Id.* Under the 1985 Statute, farming a converted wetland resulted in a proportional loss of benefits, but under the 1990 Statute, converting a wetland after November 28, 1990, would result in the loss of *all* USDA benefits on all land the farmer controls, until the wetland is restored or the loss is mitigated. 16 U.S.C. §§ 3821(c) & 3822(i).

The first thing the Court must determine is which provision of the statute Horn Farms is charged with violating, as it controls the outcome on one issue. The wetland certification notice issued to Gene Horn states that he had four tracts – field un2, un3, un4, and un5 – that were classified as CW+1998. Admin. R. at p. 24. The explanatory comments state that CWyr means a wetland converted after 11/28/1990. *Id.* at p. 25. Other parcels examined at the same time were labeled PC/NW, which stands for Prior-converted Cropland/Non Wetland; NW, which stands for Non Wetland; and W, which stands for Wetland. *Id.* at p. 24. Since the four parcels found to be in violation are labeled CW+1998, they are wetlands converted after November 28, 1990, and fall under subsection (c). Subsection (a) does not apply to wetlands converted after November 28, 1990.

The specific statutory provision at issue, 16 U.S.C.A. § 3821(c), Wetland conversion, states:

> Except as provided in section 3822 of this title and notwithstanding any other provision of law, any person who in any crop year beginning after November 28, 1990, converts a wetland by draining,

> dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland shall be ineligible for those payments, loans, or programs specified in subsection (b) of this section for that crop year an all subsequent crop years.

Subsection (c) references subsection (b) in order to identify the particular payments, loans, or programs that a violator can no longer receive. This reference could create confusion, however, because the first paragraph of subsection (b) states, "If a person is determined to have committed a violation under subsection (a) of this section during the crop year, the Secretary shall determine which of, and the amount of, the following loans and payments for which the person shall be ineligible." 16 U.S.C.A. § 3821(b). Under subsection (a), the amount of loans or payments that the person is ineligible for is "to be proportionate to the severity of the violation." 16 U.S.C.A. § 3821(a)(2).

However, Horn Farms and Gene Horn were not charged with violating subsection (a), but rather subsection (c), which does not contain a proportionality requirement. A person who converts a wetland after 1990 is in violation of subsection (c), as noted above, and is ineligible for *all* payments, loans, or programs specified in subsection (b), for that crop year and *all* subsequent years.

The Statute does contain exemptions from ineligibility, however, including one for prior-converted wetlands if the original conversion of the wetland occurred prior to December 23, 1985, and the wetland characteristics returned after that date as a result of "(i) the lack of maintenance of drainage, dikes, levees, or similar structures; (ii) a

lack of management of the lands containing the wetland; or (iii) circumstances beyond the control of the person." 16 U.S.C. § 3822(b)(2)(D).

The Statute also contains a "good faith exemption", which states, "The Secretary *may* waive a person's ineligibility under section 3821 of this title for program loans, payments, and benefits as the result of the conversion of a wetland subsequent to November 28, 1990, or the production of an agricultural commodity on a converted wetland, if the Secretary determines that the person has acted in good faith and without intent to violate this subchapter." 16 U.S.C.A. § 3822(h)(1) (emphasis added). However, after a finding that the program participant acted in good faith and without intent to violate the Statute, the individual must, within one year, "implement the measures and practices necessary to be considered to (sic) actively restoring the subject wetland", in order to maintain eligibility. 16 U.S.C.A. § 3822(h)(2).

The Statute also contains a provision that for regaining eligibility if, prior to the beginning of the crop year, "the person has fully restored the characteristics of the converted wetland to its prior wetland state or has otherwise mitigated for the loss of wetland values, as determined by the Secretary, through the restoration, enhancement, or creation of wetland values in the same general area of the local watershed as the converted wetland." 16 U.S.C. § 3822(i).

The Statute and the Code of Federal Regulations divides responsibility for administering the "Swampbuster" provisions between two USDA agencies: the Natural Resources Conservation Service (the "NRCS"), and the Farm Service Agency (the "FSA"). The Statute

requires the NRCS to make all technical determinations, restoration and mitigation plans, and to conduct monitoring activities pursuant. 16 U.S.C.A. § 3822(j). The Code of Federal Regulations assigns the following determinations to the NRCS:

> (1) whether the land at issue was a wetland converted for the purpose of, or having the effect of, making the production of an agricultural commodity possible;
>
> (2) whether a farmed wetland or farmed-wetland pasture is abandoned;
>
> (3) whether the planting of an agricultural commodity on a wetland is possible under natural conditions;
>
> (4) whether maintenance of existing drainage exceeds the scope and effect of the original drainage;
>
> (5) whether a plan for the mitigation of a converted wetland will be approved and whether the mitigation of a converted wetland is accomplished according to the approved mitigation plan.

7 C.F.R. § 12.6(c)(2)(B)(viii)-(xii). The NRCS also determines whether land is a prior-converted cropland and meets the definition of a prior-converted cropland as of the date of its wetland determination. 7 C.F.R. § 12.5(b)(1)(i).

The responsibilities of the Farm Services Agency include making the following determinations:

(1) ineligibility of benefits;

(2) whether conversion of a particular wetland was commenced before December 23, 1985, for the purposes of § 12.5(b)(3);

(3) whether the violations were made in good faith.

7 C.F.R. § 12.6(a); 7 C.F.R. § 12.6(b)(vi) and (viii). In addition, appeals, including appeals of NRCS technical determinations, must be filed with the FSA County Committee. 7 C.F.R. § 12.6(b)(9); 7 C.F.R. § 12.12; 7 C.F.R. § 614.101(a)(2); and 7 C.F.R § 780.9. If the decision of the FSA County Committee is unfavorable, program participants *must* seek review before a Hearing Officer of the National Appeals Division, and *may* appeal to the Director of the NAD, before seeking judicial review. 7 C.F.R. § 11.2(b) (emphasis added).

IV. STANDARD OF REVIEW

Both parties in this action have moved for summary judgment pursuant to Fed.R.Civ.P. 56. The standards a court employs in reviewing a motion for summary judgment are well-established. Summary judgment is proper only if the record shows that there is no issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether a genuine issue of material fact exists, the court must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *King v. Preferred Technical Group,* 166 F.3d 887, 890 (7th Cir. 1999) (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970)).

Where cross-motions for summary judgment are involved, the court looks to the burden of proof that each party would bear on the issue at trial, requiring that party to go beyond the pleadings and affirmatively establish a genuine issue of material fact. *Santaella Metro. Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997). The court is not required to grant judgment as a matter of law for one side or the other. *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993); *Judsen Rubber Works, Inc. v. Manufacturing, Prod. & Serv. Workers Union Local No. 24*, 889 F. Supp. 1057, 1060 (N.D. Ill. 1995). Rather, the court must evaluate each party's motion on its own merits, resolving factual uncertainties and drawing all reasonable inferences against the party whose motion is under consideration. *Heublein*, 996 F.2d at 1461; *Judsen*, 889 F. Supp. at 1060; *Buttitta v. City of Chicago*, 803 F. Supp. 213, 217 (N.D. Ill. 1992), *aff'd*, 9 F.3d 1198 (7th Cir. 1993). In other words, the court must extend to each party the benefit of any factual doubt when considering the other's motion, a process that sometimes forces the denial of both motions. *Id.*

V. ANALYSIS

The Administrative Procedures Act provides multiple theories for individuals to challenge the actions of Federal agencies in Federal court. 5 U.S.C. § 706. The Court is instructed to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Id.* The Court is authorized to

> (1) compel agency action unlawfully withheld or unreasonably delayed; and

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (B) contrary to constitutional right, power, privilege, or immunity; or
> >
> > (C) in excess of statutory jurisdiction, authority, or limitations or short of statutory right;

5 U.S.C. § 706(A)-(C).

The Plaintiff has asked this Court for injunctive and declaratory relief based on several theories under the APA. First, it claims that the Defendants actions violated the Due Process Clause found in the Fifth Amendment of the United States Constitution because they failed to provide a meaningful opportunity to be heard prior to terminating its benefits under the Farm Bill. Pl.'s Mem. in Supp. at 10. The Plaintiff also alleges that the statute at issue is a violation of the Spending Power of the United States Constitution because it amounts to impermissible coercion. *Id.* Finally, the Plaintiff challenges various decisions made by the USDA as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Id.*

The Defendants also filed a Motion to Dismiss in this case. In addition to addressing the three claims listed above, the Defendants addressed another issue in the Plaintiff's Complaint based on 5 U.S.C. § 558, requiring fair notice and a hearing before terminating a license. The Court will address these issues in the following order: first, whether the Plaintiff was afforded due process before the termination of his eligibility in various farm subsidy

programs; second, whether the Swampbuster provisions exceed Congress's authority under the spending clause; third, whether the agencies' decisions were arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law; and finally, whether the provisions in 5 U.S.C. § 558 apply to this case.

A. Procedural Due Process Analysis

The basis of the Plaintiff's Due Process claim is its inability to get a review of the district conservationist's determinations that the areas at issue were converted wetlands, and that they did not qualify for an exemption as prior-converted wetlands. For a Due Process violation, the Plaintiff must establish that the government has deprived it of a protected interest in liberty or property, and that it was deprived of that interest without adequate process of law. *See, American Manufacturers Mutual Insurance Company v. Sullivan,* 526 U.S. 40, 59 (1999).

The Defendants in this case concede that the Plaintiff's eligibility to participate in various farm subsidy programs is a protected interest under the Fifth Amendment. Def.'s' Mem. in Supp. at p. 19. The Defendants assert, however, that the process afforded to the Plaintiff under the current regulatory system affords all the process that is constitutionally required. *Id.* In 1970, the Supreme Court of the United States held that the fundamental requisite of due process of law is an opportunity to be heard "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970). In *Goldberg*, a

case that has not been limited to its own facts,[9] the Court stated, "these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Id.* at 267-68.

To assist in evaluating Procedural Due Process claims, the Supreme Court set forth a three-part balancing test in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); a test that is still in use in this Circuit, *see, Doyle v. Camelot Care Centers, Inc.* 305 F.3d 603 (7th Cir. 2002). This test requires consideration of (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probably value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.*

A survey of the caselaw applying the Swampbuster provisions in effect prior to 1996 reveals that program participants in danger of losing their eligibility in USDA farm programs had several levels of appeal on critical wetlands determinations. In 1995, the National Appeals Division Rules of Procedure changed, effective January 16,

---

[9] *See, i.e., Atkins v. Parker*, 472 U.S. 115, 128 (1985) (finding a protectable interest in food stamp benefits); *Goss v. Lopez*, 419 U.S. 565, 575-76 (1975) (same, for the right to education at public school); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (same, for disability benefits); *Youakim v. McDonald*, 71 F.3d 1274, 1288-89 (7th Cir. 1995) (same, for foster care benefits); and others.

1996. Under the new rules, program participants like Horn Farms cannot get any review of the district conservationist's technical determinations unless the FSA County Committee *agrees with* their appeal.[10] The question

---

[10] The rules on appeals contain numerous cross-references on the issue of appealing the district conservationists' technical determinations, creating a regulatory maze that is difficult to follow. First, 7 C.F.R. § 12.6(b)(9) states,

> Persons who are adversely affected by a determination made under this section and believe that the requirements of this part were improperly applied may appeal, under § 12.12 of this part, any determination by NRCS.

Then, 7 C.F.R. § 12.12, states

> Any person who has been or who would be denied program benefits in accordances with § 12.4 as the result of any determination made in accordance with the provisions of this part may obtain a review of such determination in accordance with the administrative appeals procedures of the agency which rendered such determination. Agency appeal procedures are contained in the Code of Federal Regulations as follows: FSA, part 780 of this title; NRCS, part 614 of this title.

Since Horn Farms wishes to appeal a technical determination of the NRCS, the applicable regulation is 7 C.F.R. § 614.101(a)(2), which states,

> Once the technical determination is final, the landowner or program participant may appeal the technical determination to the FSA county or area committee pursuant to 7 CFR. part 780. Landowners or program participants wishing to appeal must exhaust any available appeal procedures through the FSA county committee prior to appealing to NAD. Judicial review is available only as specified in 7 CFR part 11.

Again, since Horn Farms is seeking judicial review, the next regulation in the maze is 7 C.F.R § 780.9, on appeals of NRCS technical determinations, which states,

> (a) Notwithstanding any other provision of this part, a technical determination of NRCS issued to a participant pursuant to Title XII of the Food Security Act of 1985, as

(Continued on following page)

before the Court is whether the new regulations provide program participants with an opportunity to be heard at a meaningful time and in a meaningful manner, as required by the Due Process Clause of the Constitution of the United States. The Court could find no cases discussing the new regulations as a possible violation of the Due Process Clause.

However, several cases discuss the review that was afforded under the old regulations, which the Court will include in some detail for the purpose of comparison. For example, in *Dierckman,* from the Seventh Circuit Court of Appeals, the farmer appealed from an unfavorable determination by the district conservationist, first to the area conservationist, then to the state conservationist. *United States v. Dierckman*, 210 F.3d 915, 920 (7th Cir. 2000). Before affirming the determination of the area conservationist, members of the state conservationist's wetland appellate review team visited the farm and performed field tests. *Id.* He later appealed the wetland and conversion determinations to the state conservationist. *Id.* at 921.

Similarly, in a case from the Eight Circuit Court of Appeals, after the District Conservationist made his initial, unfavorable determination, the plaintiff appealed

---

amended, including wetland determinations, may be appealed to a county committee in accordance with the procedures in this part.

(b) If the county committee hears the appeal *and agrees with* the participant's appeal, the county committee shall refer the case with its findings to the NRCS State Conservationist to review the matter and review the technical determination. The court or State committee decisions shall incorporate, and be based upon, the NRCS State Conservationist's technical determination. (emphasis added).

to the Area Conservationist. *Downer v. U.S. By and Through Dept. of Agriculture,* 894 F. Supp. 1348 (D.S.D. 1995); affirmed, 97 F.3d 999 (8th Cir. 1996). A resource conservationist, an area engineer, a soil conservationist, and a soil specialist from the University of Minnesota conducted an on-site inspection, with the plaintiff and his attorney present. When he again received an unfavorable determination, the plaintiff appealed to the State Conservationist, and another on-site inspection was conducted, this time by a soil conservation engineer, a South Dakota Area III soil scientist, and a South Dakota biologist. Then, the plaintiff appealed to the Chief of the SCS, who returned it to the state level to supplement the record. An informal hearing was held, and the State Conservationist again determined that the areas in question were converted wetlands. The case then went to the Chief, SCS, where the supplemented administrative record was reviewed by a wildlife biologist, a drainage engineer and a soil scientist, who all agreed with the determination that the areas were converted wetlands. *Id.* After exhausting his appeals through the SCS, the plaintiff then appealed to the ASCS for reconsideration of the SCS determination, where it went through three levels of appeal. *Id.*

In this case, Albert Tinsley performed an on-site inspection in the presence of Gene Horn, the owner of Horn Farms. He made some field notes, and looked at "slides" of the area from 1981 to 1985. He noted that the field appeared to have been drained at some point in time, but that they system stopped functioning and trees returned at some time, no later than in the 1970's, and "were not suitable for a determination of PC during the pertinent 1981-1985 time frame for purposes of the Farm Bill provisions or the 1993-1998 time frame for purposes of the

Clean Water Act." Admin. R. at p. 75. The letter informing the Plaintiff that he had violated the Swampbuster provisions by converting wetlands which was dated May 5, 1999, was signed "Daniel M. Rosswurm, Resource Conservationist". *Id.* at p. 72. The letter states, "I am making a preliminary technical determination" that the fields contain converted wetlands. *Id.* It appears from this language that Rosswurm actually made the technical determinations that the Plaintiff challenges, based on the field visit made by Tinsley.

Under the new regulations, the Plaintiff's only option was to appeal the NRCS technical determinations to the FSA County Committee, even though the County Committee did not have authority to review the technical determinations. The role of the FSA County Committee is simply to decide if it agrees with the Plaintiff's appeal, and if not, to make the eligibility decisions. In other words, in order to get review of the district conservationist's determinations that he converted 6.2 acres of wetlands, and that the exemption for prior-converted cropland did not apply, the Plaintiff had to convince the County Committee to *agree with* its appeal. If the County Committee does not agree with the appeal, the appeal is over, the Plaintiff cannot get review of the NRCS technical determinations that terminated its eligibility.

This is a high standard to require participants to meet, one that has the practical effect of eliminating most, if not all, review of the district conservationist's technical determinations. For example, in this case, the FSA County Committee determination was issued only one day after the hearing and simply stated that "merit could not be found in regards to making a recommendation the NRCS technical determination be reviewed by the Indiana NRCS

State Conservationist." In other words, after considering the matter for one day, the County Committee issued a one line ruling that turned out to be unreviewable by the NAD, according to NAD hearing officer, Michael Jacobs.

Furthermore, the County Committee did not rule on the good faith issue, even though Congress assigned responsibility for that decision to the FSA. The good faith exemption allows the Agency to waive a person's ineligibility upon a finding that the person acted in good faith and without intent to violate the Swampbuster provisions. The person is then given one year to restore the wetland, without losing any benefits available under the Food Security Act. However, by the time the County Committee was presented with the Plaintiff's request for a good faith exemption, it was too late to provide the Plaintiff with any relief. Horn Farms lost its eligibility in 1999 and payments were terminated, but the hearing before the County Committee did not take place until 2001. Although this provision is discretionary with the Agency – the statute says the Secretary *may* waive ineligibility – there is no evidence in the record that the Agency even considered Horn Farms application for the good faith exemption.

The Defendants assert, however, that Plaintiff's Due Process grievance is based on the fact that it was not provided with an adversarial type hearing. The Defendants are correct in pointing out that the Plaintiff was not entitled to an adversarial type hearing, but the Plaintiff's objections are not to the type of hearing, but to the limitations on its opportunity to get any review of the district conservationist's technical determinations.

By inserting a new level of bureaucracy in the process – the requirement that the FSA County Committee *agree*

with Plaintiff's appeal – between the technical determination and any review of that determination, the Plaintiff was effectively denied any opportunity to be heard at a meaningful time and in a meaningful way on the issues at the heart of their appeal: the wetlands determination, and the denial of prior-converted farmland status. The Plaintiff was given a mediation hearing, but that was only for the purpose of determining how to get Horn Farms back into compliance with the statute. The unfavorable technical determination was not even on the agenda.

While the former process was lengthy and in all likelihood expensive, it protected the Due Process rights of farmers who participated in programs under the Farm Bills. The new regulatory process requiring that the FSA County Committee *agree with* the participant's appeal places an almost insurmountable obstacle in the way of participants seeking review of an unfavorable opinion by the district conservationist. The Court will therefore apply the *Mathews* balancing test to determine whether the new regulations violate Plaintiff's Due Process rights.

First, the Court finds that the participant's interest in remaining in federal farm programs is great. The economic climate is such that eligibility in Farm Bill programs can make or break a farmer.[11] On the second factor, the risk of erroneous deprivation of the interest through the procedures used is fairly high, since the determination appears to be based on the opinion of just one district conservationist.

---

[11] *See* the Plaintiff's arguments on the issue of impermissible coercion under the Spending Clause, Pl.'s Reply Mem. at 4-7. As of the end of 2003, the USDA had withheld approximately $154,961.36 in payments that Horn Farms would have received but for the determination that it violated the Swampbuster provisions. Pl.'s Ex. E.

Also, on the second factor, having additional review by experts would reduce the risk of an error. Finally, the burden of the additional procedures on the government is also fairly high, as illustrated by the lengthy review process in the two cases discussed above that were decided under the old regulations.

Although it is close, the importance to America's farmers of maintaining eligibility in farm programs administered by the USDA weighs heavily in favor of requiring additional process within the NRCS before issuing the final technical determination that terminates a farmer's eligibility to participate in all programs under the Food Security Act. Therefore, the Court concludes that the new regulatory scheme for appealing unfavorable technical determinations by the NRCS violates the Plaintiff's Due Process right to an opportunity to be heard at a meaningful time and in a meaningful manner. This does not mean that the entire process from the previous regulations must be reinstated, but simply that the Plaintiff is entitled to review of the NRCS technical determinations by someone at a higher level within the NRCS.

B. Spending Clause Analysis

The Plaintiff seeks to have the Swampbuster provisions invalidated as an improper exercise of Congressional authority under the Spending Clause, because they are impermissibly coercive. The Defendants argue that the Seventh Circuit considered this issue in *Dierckman*, and determined that the Statute was a valid exercise of Congressional authority under the Spending Clause. *See, Dierckman*, 201 F.3d at 922. *Dierckman* is directly on point. The Seventh Circuit stated, "Even though Congress

may lack the authority to regulate directly a strictly intrastate wetland, the incentive provided by the Food Security Act is a valid exercise of the spending power." *Id.*

The Plaintiff argues that, nevertheless, the standard to determine impermissible government coercion for an individual citizen must be more relaxed, because most cases analyzing conditional federal spending arguably interfere with a state's autonomy. But that is precisely the reason that coercion is even being discussed in those cases, because the Constitution limits the power of Congress to force the states to carry out Congressional policy. *See, South Dakota v. Dole,* 483 U.S. 203, 206 (1987). The Plaintiff has not explained how coercing farmers to protect wetland or risk losing their federal farm program benefits violates the Constitution.

The Court agrees that the Swampbuster provisions are coercive, in fact, they give the USDA a big club with which to protect wetlands. However, Congressional authority under the Spending Clause is only limited by other provisions in the Constitution, and establishing that Congress has placed "unconstitutional conditions" on the receipt of federal funding is an uphill battle. *See, South Dakota v. Dole,* 483 U.S. 203, 206 (1987) (holding that the conditions were valid), *Rust v. Sullivan,* 500 U.S. 173 (1991) (same), and *United States v. American Library Ass'n,* 539 U.S. 194 (2003) (same).[12] *See also,* Pl.'s Reply at

[12] Examples in which non-state plaintiffs have alleged unconstitutional conditions in Congressional appropriation requirements are *Rust v. Sullivan,* 500 U.S. 173 (1991), and *United States v. American Library Ass'n,* 539 U.S. 194 (2003). In *Rust,* the plaintiffs claimed that the government's refusal to fund abortion counseling violated their free speech rights. Plaintiffs also claimed that the requirement violated a woman's right to have an abortion. *Id.* The Supreme Court upheld the

(Continued on following page)

5, citing *United Seniors Association, Inc. v. Shalala*, 2 F. Supp. 2d 39, 42 (D.D.C. 1998).

One of the modern realities is that conditioning of Congressional appropriations has become vastly important in the enunciation and enforcement of public policy on the States, and in this case, on American farmers.[13] It is a phenomenon that the writers and founders of the Constitution probably did not contemplate. But the reality is that Congress can condition appropriation in very important ways that permit the creation of public policy indirectly which sometimes could not be done directly. This may be such a case. It is likely that the limitations on the authority of Congress in the Commerce Clause, as interpreted by the Supreme Court of the United States in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. § 159 (2001), would inhibit

---

requirement as a valid under the Spending Clause. *Id.* In *American Library Ass'n*, plaintiffs challenged provisions in the Children's Internet Protection Act, which required public libraries to use Internet filters as a condition for receipt of federal subsidies, claiming that the statute placed unconstitutional conditions on public libraries and violated their free speech rights. Again, the Supreme Court found it to be a valid exercise of Congressional power under the Spending Clause.

[13] The Plaintiff supports its argument with a citation to the 1936 Supreme Court decision in *United States v. Butler* 297 U.S. 1, 71 (1936), which states that the power to confer or withhold unlimited benefits is the power to coerce or destroy. The Court in *Butler* struck down a funding condition similar to the one at issue in this case. *Butler*, 297 U.S. at 71. However, the reasoning in *Butler* has not been followed in any subsequent Supreme Court case, and "Federal courts of appeal have been similarly reluctant to invalidate funding conditions." *Kansas v. United States*, 214 F.3d 1196 (10th Cir. 2000). "The coercion theory has been much discussed but infrequently in federal case law, and never in favor of the challenging party." *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989).

this particular regulation if done directly rather than as a condition found in an appropriation bill. As it is, Defendants' Motion for Summary Judgment on this issue must be **GRANTED.**

C. Arbitrary and Capricious Review

The Plaintiff also claim that two of the Defendants' decisions in this case were arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of 5 U.S.C. § 706(A). The court must ask "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Highway J Citizens Group v. Mineta* 349 F.3d 938 (7th Cir. 2003), citing *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378 (1989) (internal quotations and citations omitted).

This is a highly deferential standard, but does not equate with no review at all. *See, Bagdonas v. Department of Treasury,* 93 F.3d 422, 425 (7th Cir. 1996). "The inquiry must be thorough and probing." *Id.* at 426. The court must uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned, but the court may not supply a reasoned basis for the agency's action that the agency itself has not given. *Id.* (citations omitted). The agency is not required to include detailed findings of fact, but must inform the court and the petitioner of the grounds of the decision and the essential facts upon which the decision was made. *Dierckman,* 201 F.3d 915, 926 (7th Cir. 2000) (citations omitted).

"To perform this review the court looks to whether the agency considered those factors Congress intended it to consider; whether the agency considered factors Congress

did not intend it to consider; whether the agency failed entirely to consider an important aspect of the problem; whether the agency decision runs counter to the evidence before it; or whether there is such a lack of a rational connection between the facts found and the decision made that the disputed decision cannot 'be ascribed to a difference in view or the product of agency expertise.'" *Downer v. U.S. By and Through U.S. Dept. of Agriculture and Soil Conservation Service,* 97 F.3d 999, 1002 (8th Cir. 1996), *quoting, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S. Ct. 2856, 2867, 77 L. Ed.2d 443 (1983).

1. The Challenged Agency Decisions

The two decisions that Plaintiff wants reviewed under this standard are the USDA's determination that the it unlawfully converted wetlands, by failing to recognize that the land at issue was a prior-converted wetland, and the USDA's failure to conduct the required proportionality analysis. Pl.'s Response at 6-7. The Court has already considered the proportionality requirement and determined that the statutory provision that Plaintiff is accused of violating does not require a proportionality analysis. Therefore, Defendants' Motion for Summary Judgment on the proportionality issue is **GRANTED.**

2. The Prior-converted Wetland Issue

Resolving the prior-converted wetland issue requires a detailed analysis of the statute and implementing regulations. The specific statutory language on prior-converted wetlands states:

(b) Exemptions

No person shall become ineligible under section 3821 of this title for program loans or payments under the following circumstances:

(2) For the conversion of the following:

(D) A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date as a result of –

(i) the lack of maintenance of drainage, dikes, levees, or similar structures;

(ii) a lack of management of the lands containing the wetland; or

(iii) circumstances beyond the control of the person.

16 U.S.C. § 3822(b)(2)(D).

The Government and Plaintiff agree that at some time the area at issue had a drainage system and was farmed. *See*, Admin. R. at p. 75. Tinsley's Field Trip Notes state,

> The chronology of this field appears to be that it was drained many decades ago, the system stopped functioning, trees had returned sometime no later than in the 1970's and were not suitable for a determination of PC during the pertinent 1981-1985 time frame for purposes of the Farm Bill provisions or the 1993-1998 time frame for purposes of the Clean Water Act.

Id.

The issue is whether the Plaintiff's 6.2 acres of converted wetland qualifies for the exemption as prior-converted wetland. The briefs by the parties indicate an ambiguity in section (D) of the statute, in the phrase "A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status *after that date* as a result of . . . " (emphasis added). Plaintiff claims that "after that date" means after the date that the wetland was originally converted. Defendants construe the "after that date" language as a reference to the effective date of the statute, December 23, 1985.

According to the Plaintiff's interpretation, the 6.2 acres are wetlands that were converted prior to 1985, they returned to wetland status at some time after the original conversion, as a result of lack of maintenance of the drainage system, therefore, the land qualifies. According to the Defendant's interpretation, the Plaintiff's 6.2 acres contained functioning drainage tiles at one point in time, but wetland conditions had already returned by December 23, 1985. Therefore, the Defendants assert that this exemption does not apply because the wetland status returned after the effective date of December 23, 1985.

The USDA has interpreted this provision of the statute in 7 C.F.R. § 12.5(b)(1)(i), which states that the exemption applies if the land is "a prior-converted cropland and meets the definition of a prior-converted cropland as of the date of a wetland determination by NRCS." The Regulations define prior-converted cropland in 7 C.F.R. § 12.2(8), which states,

> Prior-converted cropland is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:
>
> (i) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less . . .

In his field visit notes, the district conservationist observed that the areas where he saw broken drain tiles had been in mature trees prior to 1981, and that the system had stopped functioning and trees had returned sometime no later than in the 1970's. Therefore, he concluded that it was not suitable for a determination of PC (prior-converted wetland). The field notes do not explain why the presence of mature trees makes the area unsuitable for a determination of prior-converted wetland. It is possible that Tinsley had in mind the definition of prior-converted cropland in 7 C.F.R. § 12.2(8), that as of December 23, 1985, the converted wetland did not support woody vegetation, but the field notes do not explain the connection between the presence of trees and the denial of "prior-converted cropland" status for these areas.

The Court must first determine if the USDA's interpretation of the statute is "reasonable", before getting to the issue of whether the Agency's decisions in this case were arbitrary and capricious. The analysis for USDA regulations under the Swampbuster provisions follows the framework established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). *Dierckman,* 201 F.3d at 923. The starting point

of the analysis is the statutory language, and if "the plain meaning of the text of the statute either supports or opposes the regulation," the inquiry ends, and the court must apply the statute's plain meaning. *Id.* at 923, quoting *Solid Waste Agency,* 191 F.3d at 581. If the statute is silent or ambiguous, "the court must defer to the agency interpretation so long as it is based on a reasonable reading of the statute." *Id., see also, Hanson v. Espy,* 8 F.3d 469, 472-73 (7th Cir. 1993).

As noted above, the statutory language is ambiguous. The Agency's interpretation is reasonable, and that would ordinarily end the analysis. However, the Plaintiff has cited to the Congressional Record, claiming that the discussion surrounding enactment of the Swampbuster Amendment indicates that it was the intent of Congress to grandfather land that was in production at any time in the past. Pl.'s Mem. in Supp. at 40, n.23, *citing,* H.R. REP. 99-271, pt. 1, at 419, 99th Cong. (1st Sess. 1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1523. The discussion was between then Representative Tom Daschle, the sponsor of the Swampbuster Amendment, and other Representatives. Because it reflects the views of Congress on the Amendment, the entire discussion is set forth below.

> Mr. Daschle was recognized to offer a clarifying amendment to the previously adopted Swampbuster provisions. Mr. Daschle briefly explained the provisions of the Amendment. Mr. Lewis offered an Amendment to the Amendment to clarify that the definition of wetlands would not include simply wet soils. Mr. Daschle said he would accept the Amendment. The Committee agreed to the Lewis Amendment by voice vote. Mr. Daschle and Mr. Lewis discussed the question of cropland that has been flooded and later

> reclaimed. Mr. Daschle stressed that the Amendment would not affect the use of this land because if production was underway at any time in the past, the land would be grandfathered.

Id. The Amendment passed in the form of the legislation now before this Court for interpretation. The 6.2 acres at issue in this case were at one time drained and farmed. According to the author of the Swampbuster provisions, cropland like the Plaintiff's, land that was farmed, then flooded and later reclaimed, would be grandfathered if it was in production at any time in the past. Even though the language of the statute is ambiguous, it appears that Congress considered this issue, and the record supports the Plaintiff's position.

The Court is mindful that the Swampbuster provisions were strengthened in 1990, and altered again in 1996, and those changes must be considered to determine if Congress spoke directly on the issue. The Plaintiff points out that a change in 1996 on abandonment favors their interpretation of the statute. Pl.'s Mem. in Supp. at 40.[14] Under the old regulations, prior-converted cropland that was not farmed for five years was deemed "abandoned" and lost its exempt status. *Id.* In order to retain exempt status, the farmer had to plow up the land every five years. *Id.* According to Warren Lee, the Director of the Watersheds and Wetlands Division of the NRCS,

> [I]f a landowner with a PC [prior-converted cropland] wishes to provide wetland functions and values to society by letting his land labeled PC

[14] The NRCS summarized changes to the Swampbuster provisions in a factsheet available on their website at <http://www.nrcs.usda.gov/programs/wetlands/ChngFact.html>

> revert back to a wetland, we should not make him plow it up every five years just so he can keep his designation. Even if he wishes to then turn it into a corn field fifteen years later, society received those benefits of the wetland for that time, and it doesn't seem right to penalize the producer by saying he just converted a wetland. That is not the intent of Swampbuster or abandonment.[15]

Based on the Agency's interpretation of the statute, if the Plaintiff's land was farmed in 1985, then allowed to return to a wetland, he could clear it and farm it without violating the statute. But, because farming ceased on these areas a few years earlier, in the late 1970's, and trees were growing on some of the tracts in 1985, the Plaintiff violated the Swampbuster provisions. Based on the Agency's interpretation of the statute, the 6.2 acres cleared were "not suitable for a PC determination" because they were not farmed in 1985 or the five years prior to 1985.

In light of Mr. Daschle's statements in the Congressional record, and the statutory change doing away with the concept of abandonment, the Court finds that the Agency's requirement that land be farmed in 1985 to qualify as prior-converted cropland is not a reasonable interpretation of the statute. In this case, society has had the benefit of wetlands on Plaintiff's 6.2 acres for more than twenty years, and, in the words of Warren Lee, "it

---

[15] McBeth, Daryn, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 Harv. Envtl. L. Rev. 201, 256 (1997).

doesn't seem right to penalize [Horn Farms] by saying [it] just converted a wetland."

This Court has here attempted to wade through a highly complicated and often convoluted series of federal regulations and procedures that often stretched and in this case, exceeded Congressional authority under the statute. The Court has literally plowing through this complex and complicated record, and finds that the issue comes down to the intent of Congress, another highly complicated concept, with complications upon complications. After minute consideration of the record and the regulations at issue in this case, the Court has come down on the side of effectuating the intent of Congress as expressed by a key sponsor of the legislation in that regard. Once that decision is made, the result here is easier to determine. After Congress changed the statute in 1996, overruling the Agency's regulations on abandonment, it is a small step for this Court to find that the Agency's definition of "prior-converted cropland", requiring that the land be in production in 1985 to qualify, exceeds the Agency's statutory authority and must also be overruled.

D. Applicability of 5 U.S.C. § 558

The Plaintiff's Complaint also asserts a claim under 5 U.S.C. § 558(c), for failure to give notice and an opportunity to demonstrate or achieve compliance before termination of its "license" to participate in the farm programs. The Defendants argue that this provision does not apply, claiming that it only applies to a license that is "required by law", and that participation in USDA farm programs is not required by law in order for the Plaintiff to farm. The

Plaintiff counters that the "required by law" provision only applies to applications for licenses, it is not repeated in the second sentence addressing termination of licenses.

5 U.S.C. § 558(c) states:

> (c) When application is made for a license *required by law,* the agency . . . shall set and complete proceedings required to be conducted in accordance with sections 556 or 557 of this title or other proceeding required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given –
>
> > (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
> >
> > (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c) (Emphasis added).

For this provision to apply, a license must be involved. A license is defined as "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8). This definition is "extremely broad", as noted by the Ninth Circuit Court of Appeals in *Air North America v. Dept. of Transportation,* 937 F.2d 1427, 1437 (9th Cir. 1991). At issue in *Air North America* was a certificate issued by the Department required for an airline to fly. The Court determined that the certificate,

although not in itself sufficient to allow the airline to fly, nevertheless fit within the broad statutory language.

In other cases, courts have determined that the language was broad enough to cover a permit to graze on national forest land, *Anchestegui v. Dept. of Agriculture*, 257 F.3d 1124 (9th Cir. 2001); to "specifically approved stockyard" status under the Cattle Contagious Diseases Act, *Moore v. Madigan*, 789 F. Supp. 1479 (W.D. Mo. 1992), *affirmed*, 990 F.2d 375, *rehearing denied, cert. denied*, 114 S.Ct. 83; to veterinarian accreditation, *Charlene Hagus, D.V.M. v. Michael Espy, Secretary, USDA*, 53 Agric. Dec. 443, 1994 WL 733120 (U.S.D.A.); to designation by the Immigration and Naturalization Service of a facility as an approved laboratory for conducting medical examination, *New York Pathological & X-Ray Laboratories, Inc. v. Immigration and Naturalization Service*, 523 F.2d 79 (2d Cir. 1975); and to approval granted to an institution of higher learning authorizing entry of nonimmigrant alien students for study, *Blackwell College of Business v. Attorney General*, 454 F.2d 928 (D.C. Cir. 1971); among others.

In this case, the USDA's approval or permission is required for farmers to participate in various farm programs under the Food Security Act of 1985 and subsequent Farm Bills. Therefore, based on the broad definition of license to include agency "approval" or "other form of permission" the Court concludes that Plaintiff's eligibility to participate constitutes a "license" for purposes of section 558(c).

However, as already noted, the Defendants have a second argument, that even if the Plaintiff can establish that it has a "license" to participate in farm programs, that license is not "required by law." Def.'s Mem. in Supp. at

p. 17. The Defendant asserts that the determinative issue is not "whether farmers who apply for certain USDA subsidy programs had to comply with the requirements of the Swampbuster provisions in order to receive those subsidies, but rather whether farmers are required by law to participate in USDA farm programs in order to farm." *Id.* The Court is not convinced.

The license at issue is the USDA's approval or permission to participate in various farm subsidy programs. In other words, the "license" is "required by law" in order to participate in the programs, just as a grazing permit is required to graze cattle in a national forest, or approval is required for an institute of higher learning to accept nonimmigrant alien students. *See, Anchestegui* 257 F.3d 1124; and *Blackwell College of Business*, 454 F.2d 928. The Government is correct that in some cases, the license requirement is broad, and failure to obtain a license forecloses all opportunity to work in a certain field, as with the requirement that veterinarians be accredited, *Charlene Hagus, D.V.M.*, 53 Agric. Dec. 443, 1994 WL 733120, or the requirement that airlines have the certificate in order to fly, *Air North America*, 937 F.2d at 1437, but that is not always the case.

The Court concludes that the "license" at issue in this case is required by law for farmers to participate in various programs under the Farm Bill, triggering the provisions in section 558(c) of the APA. This provision does not create a right to a full adjudicatory hearing, but at a minimum requires that before termination of Plaintiff's "license", Defendants had to provide notice and an opportunity to demonstrate or achieve compliance with lawful requirements. *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067 (7th Cir. 1982) (noting that the sole purpose of

section 558(c) is to provide licensee threatened with termination of license an opportunity to correct its transgressions before actual suspension or revocation). The Plaintiff was given notice, but no opportunity to achieve compliance before termination of its eligibility. Therefore, summary judgment for the Plaintiff is appropriate on this issue.

The Court notes that this provision of the APA provides protection that is similar to, but greater than, the "good faith exemption" in the statute. Under the "good faith exemption", the Secretary has discretion to waive ineligibility and allow the person to implement measures to restore the wetland. 16 U.S.C.A. § 3822(h)(1)&(2). Under section 558(c), the agency must allow a reasonable opportunity for the licensee to demonstrate or achieve compliance before terminating the license. The record in this case does not indicate that the Defendants ever made a "good faith" determination. The Defendants could easily satisfy this provision of the APA by making the "good faith" determination early enough in the process to allow the Plaintiff to restore the wetland or mitigate the loss *before* terminating all benefits under the Act.

VI. CONCLUSION

For the foregoing reasons, the Defendants' Motion for Summary Judgment is granted in part and denied in part. Defendants' Motion is **GRANTED** on Claim II, based on the Spending Clause, and **GRANTED** on the claim that the USDA was arbitrary and capricious for not reducing its payments in proportion to the severity of the violation. The Plaintiff's Motion is also granted in part and denied in part. The Motion is **GRANTED** on the issue that the

USDA's decision denying the land at issue "prior converted cropland" status was arbitrary and capricious, **GRANTED** on the Due Process claim that the Agency failed to provide meaningful review of the NRCS technical decision, and **GRANTED** on the issue of compliance with the requirements of 5 U.S.C. § 558(c). This case is now remanded to the Agency for further action not inconsistent with this opinion.

IT IS SO ORDERED.

DATED: May 20, 2004

s/ Allen Sharp
ALLEN SHARP, JUDGE
NORTHERN DISTRICT OF
INDIANA

APPENDIX C

[LOGO]

United States Department of Agriculture
Natural Resources Conservation Service
[Address Omitted in Printing]

1252 E 100 S
Suite D
Rochester, IN.
46975

May 5, 1999

SUBJECT: wetland and highly erodible land determination T 980, 13599

TO: Horn Farms Inc
Gene Horn
5079 S 500 W
Kewanna, IN 46939

Dear Mr. Horn:

This is to notify you that as of the date of this letter, I am making a preliminary technical determination that fields shown in Section II of the attached NRCS-CPA-026E "HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION" form contains wetland determinations with the labels/certifications as indicated. These areas meet the wetland criteria of hydric soil, soil or surface wetland and wetland plants.

This wetland certification does not include "other waters of the United States" as defined by the Corps of Engineers, which include but are not limited to lakes, rivers, streams which are regulated under the Clean Water Act. Contact the Corps of Engineers regarding needs for permits. In order to maintain your USDA program eligibility and comply with the Clean Water Act, contact us prior to performing the following activities: land clearing, drainage and drainage maintenance, filling, leveling, dredging, land use changes.

This technical determination may affect USDA benefits such as commodity loans and Agricultural Market Transition Act contracts.

As a result of the statutory and regulatory changes, the United States Department of Agriculture appeal process has changed. Under the new appeals and mediation process, this preliminary technical determination will become final within 30 days unless you request any of the following options:

1) A field visit be made by our office to review with you the basis for our preliminary technical determination, answer any questions you have concerning the determination, and to gather additional information from you concerning the preliminary determination.

2) Right to review the records in our office.

3) Appeal rights to Farm Service Agency County Committee when decision is final.

4) Mediation be used in an attempt to settle your concerns with the preliminary determination.

Mediation is a process in which a trained, impartial person (a neutral mediator) helps look at the mutual problems, identify and consider options, and determine if we can agree on a solution. Unlike an appeal, mediation is private, confidential and informal. The mediator will help us work together to evaluate the information in your case and help us identify alternatives that will assist us resolving the dispute. The mediator has no decision making authority. A mediator cannot decide what is "right" or "make" anyone do anything. If the mediation is successful, the mediator will help us reach an agreement and document that solution in writing. Each

party will sign the agreement and you man continue to pursue the appeal.

If you choose mediation, you must contact the mediator directly and make arrangements for the process. Contact Ms. Julia Wickard at:

Indiana Agricultural Mediation Program
Office of the Commissioner of Agriculture
ISTA Center, Suite 414
150 W. Market Street
Indianapolis, IN 46204
Telephone: (317) 232-8775 FAX: (317) 232-1362

If you choose to use the mediation, NRCS will pay up to one-half of the costs that are appropriate with securing the services of the trained mediator, when the services are provided on other than voluntary basis. The NRCS will have final discretion over what is considered appropriate and reasonable.

A final determination will be issued within 30 days after the field visit, if one is requested, and/or within 30 days following the completion of the mediation. If neither is requested, this preliminary determination becomes final on 10 June 99.

The final determination, whether it is the result of the expiration of the 30 days period following receipt of this preliminary determination or receipt of a final determination may be appealed to the Farm Service Agency Fulton County Committee at the address below. If you take no action during the preliminary 30 day period, your appeal rights begin 10 June 99 and end 10 July 99.

Fulton County Committee
1252 E 100 S, Suite E
Rochester, IN 46975

If you are the owner of this tract and have a tenant, I urge you to discuss this letter and accompanying NRCS-CPA-026E with your tenant. Likewise, if you are the tenant of this land, I urge you discuss this letter with your landlord.

/s/ Daniel M. Rosswurm [jk]
DANIEL M ROSSWURM
RESOURCE CONSERVATIONIST
219-223-3220

U.S. DEPARTMENT OF AGRICULTURE NRCS-CPA-026E
NATURAL RESOURCES CONSERVATION SERVICE 8-95

HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION

Name: Horn, Gene Tract: 13599 Farm: 3472
County: Fulton Request Date: FSA Farm No.: 3472

Section I – Highly Erodible Land

Fields in this section have undergone a determination of whether they were highly erodible land (HEL) or not; fields for which an HEL Determination has not been completed are not listed. In order to be eligible for USDA benefits, a person must be using an approved conservation system on all HEL.

Field	HEL (Y/N)	Sodbusted (Y/N)	Acres	Determination Date
1	N	N	39.6	05/22/98
5	N	N	4.5	05/22/98
un1	N	N	8.0	05/22/98

Section II– Wetlands

Fields in this section have had wetland determinations completed. See the Wetlands Explanation section for additional information regarding allowable activities under the wetland conservation provisions of the Farm Bill and Section 404 of the Clean Water Act.

Field	Wetland Label	Acres	Determination Date	Certification Date
1	PC/NW	39.6	05/22/98	05/22/98
5	PC/NW	4.5	05/22/98	05/22/98
un1	NW	8.0	05/22/98	05/22/98
un2	CW+1998	0.5	04/28/99	04/28/99
un3	CW+1998	1.8	04/28/99	04/28/99
un4	CW+1998	2.1	04/28/99	04/28/99
un5	CW+1998	0.4	04/28/99	04/28/99
un6	NI	12.0	04/28/99	04/28/99

Wetlands Explanation

Wetland Label	Explanatory Comments
CWyr	Converted wetland after 11/28/90; Description: An area where wetlands were converted after 11/28/90; Authorized Cropping: Conversion caused ineligibility; Authorized Maintenance: None allowed by person; If you plan to clear, drain, fill, level or manipulate these areas contact COE**.

NI Not Inventoried;
Description: An area where no wetland determination has been completed; Authorized Cropping: May be farmed as long as no woody vegetation is removed and no hydrologic manipulation is undertaken; Authorized Maintenance: Request determination from NRCS* prior to initiating any manipulation; If you plan to clear, drain, fill, level or manipulate these areas contact NRCS* and COE**.

NW Non-wetland;
Description: An area that does not meet wetland criteria under natural conditions or wetlands that were converted prior to 12/23/85, not cropped prior to 12/23/85, does not meet wetland criteria, and has not been abandoned; authorized cropping: No Restrictions; Authorized Maintenance: No restrictions unless the manipulation would convert adjacent wetland labels.

PC/NW Prior Converted Cropland/Non-Wetland;
Description: An area that contains both prior converted cropland and non-wetland; Authorized Cropping: No restrictions; Authorized Maintenance: No restrictions unless the manipulation would convert adjacent wetland labels.

* Natural Resources Conservation Service
** Corps of Engineers

Remarks
Remaining woods should not be cleared or drained without first having a non-agricultural determination done by this office.

I certify that the above determinations are correct and were conducted in accordance with policies and procedures contained in the National Food Security Act Manual.

Signature Designated Conservationist	Date
Daniel Rosswurm /s/ Daniel M. Rosswurm	Apr. 28, 1999

All USDA programs and services are available without regard to race, color, national origin, religion, sex, age, marital status, or handicap.

U.S. DEPARTMENT OF AGRICULTURE
NATURAL RESOURCES CONSERVATION SERVICE
Requester Field Office (219) 223-3220

Assistance Notes for Date Range
04/28/99 - 04/28/99

Client Name: Horn, Gene
Business Name: Horn, Gene
Business ID: fu13599

Client Address	Business Address
5079 S 500 N Kewanna, IN 46939-	5079 S 500 N Kewanna, IN 46939-

Client Phone	Ext	Description	Business Phone	Ext	Description

NOTES

Assistance Type: Correspondence Assisted By: 000
Fund ID: CTA Date: 04/28/99

Note:
Official determination prepared and mailed on 04/28/99; land unit: 13599

Assistance Type: Land Use & Site Reviews Assisted By: AT
Fund ID: CTA Date: 04/28/99

Note:
An analysis of remote imagery and a field visit determined that the tract contains 4 Converted Wetlands in potential violation of FSA Farm Bill provisions. See notes enclosed in files. Sites were cleared of trees and tiled in 1998. Not yet cropped. Family intends to mitigate for their removal. They want to install an irrigation pivot on this site.

U.S. DEPARTMENT OF AGRICULTURE NRCS-CPA-026E
NATURAL RESOURCES CONSERVATION SERVICE 8-95

HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION

Name: Horn Farms, Inc, Gene Horn Tract: 980 Farm:
County: Fulton Request Date: FSA Farm No.:

Section I – Highly Erodible Land

Fields in this section have undergone a determination of whether they were highly erodible land (HEL) or not; fields for which an HEL Determination has not been completed are not listed. In order to be eligible for USDA benefits, a person must be using an approved conservation system on all HEL.

Field	HEL (Y/N)	Sodbusted (Y/N)	Acres	Determination Date

Section II – Wetlands

Fields in this section have had wetland determinations completed. See the Wetlands Explanation section for additional information regarding allowable activities under the wetland conservation provisions of the Farm Bill and Section 404 of the Clean Water Act.

Field	Wetland Label	Acres	Determination Date	Certification Date
4	PC/NW	40.9	04/28/99	04/28/99
un1	CW+1998	1.4	04/28/99	04/28/99

Wetlands Explanation

Wetland Label	Explanatory Comments
CWyr	Converted wetland after 11/28/90; Description: An area where wetlands were converted after 11/28/90; Authorized Cropping:

Conversion caused ineligibility; Authorized Maintenance: None allowed by person; If you plan to clear, drain, fill, level or manipulate these areas contact COE**.

PC/NW Prior Converted Cropland/Non-Wetland; Description: An area that contains both prior converted cropland and non-wetland; Authorized Cropping: No restrictions; Authorized Maintenance: No restrictions unless the manipulation would convert adjacent wetland labels.

** Corps of Engineers

Remarks

I certify that the above determinations are correct and were conducted in accordance with policies and procedures contained in the National Food Security Act Manual.

Signature Designated Conservationist	Date
Daniel Rosswurm /s/ Daniel M. Rosswurm	May 04, 1999

All USDA programs and services are available without regard to race, color, national origin, religion, sex, age, marital status, or handicap.

U.S. DEPARTMENT OF AGRICULTURE
NATURAL RESOURCES CONSERVATION SERVICE
Requester Field Office (219) 223-3220

Apr 28, 1999

Assistance Notes for Date Range
04/28/99 - 04/28/99

Client Name: ~~Rouch, George~~ Gene Horn
Business Name: ~~Von Derheide, Gary/Pat~~ Horn Farms, Inc
Business ID: fu980

Client Address	Business Address
RR2 Kewanna, IN 46939-	

Client Phone	Ext	Description	Business Phone	Ext	Description

NOTES

Assistance Type: Correspondence
Fund ID: CTA
Assisted By: 000
Date: 04/28/99

Note:
Official determination prepared and mailed on 04/28/99; land unit: 980

Assistance Type: Land Use & Site Reviews
Fund ID: CTA
Assisted By: AT
Date: 04/28/99

Note:
An analysis of remote imagery and a field visit determined that the track is pc/nw with a 1.4 Converted Wetland, cleared in 1998. This tract is now owned by the same

owner of T13598, according to the owner of T13598, where 4 other CWs are located next door to the west. See that tract for details.

[LOGO]

United States Department of Agriculture

Natural Resources Conservative Service

[Address Omitted In Printing]

January 31, 2000

Gene Horn
5079 South 500 West
Kewanna IN 46939

Dear Sir:

Enclosed is the determination for the remaining non-agricultural areas of Tract 13599. The majority of the woods is a non-wetland. There is a .4 acre wetland that extends into the south-central portion of the woods and a 1.6 acre wetland that extends into the west-central portion. There are no violations associated with these two areas. With the 6.2 acres of Converted Wetlands in the crop fields to the south of the woods you have a total of 8.2 acres of wetlands that will need to be replaced if you intend to remain in the USDA Farm Programs while clearing this tract for irrigation. If you decide not to go forward with the irrigation system, you will still need to replace the loss of the 6.2 acres of wetlands in order to continue your participation.

Since it has been awhile since we last met, I would like to review your situation with you. The situation presents three options to you. The first is to not participate in the USDA farm support programs. This would apply to all

your farming operations now and in the future, until such time that the law is changed or the wetlands are replaced. Please contact the Farm Service Agency in Rochester for the details on what this would mean to your farming operation. Tenant farmers would be able to participate in the farm programs as long as they did not crop any of the converted areas.

The second option is to restore the converted wetlands in place. This would require breaking up the newly installed tile systems and planting wetland tolerant shrubs or trees. I would be inclined not to require the planting of tree species since leaving these areas open to mature naturally would provide for a greater ecological diversity than when all the sites were in trees, but this decision would require the approval of the US Corp of Engineers (COE) and the Indiana Department of Environmental Management (IDEM), should they assert their jurisdiction under the Clean Water Act. You would be able to reroute the tile system around the wetlands or replace the wetland segments with solid tile.

We can also look at gaining approval to use shrubs and other vegetation that would not interfere with an irrigation system so that irrigation could still go on, and would even help support the wetland ecosystem. The two existing wetlands could be left in place undrained and the trees cut down. Travel lanes for the pivot tires can be constructed.

The third option is to mitigate for the loss of these wetlands. Mitigation involves either the enhancement of an existing wetland, the restoration of nearby cropland areas back to the wetlands they used to be, the creation of wetlands on upland areas, or some combination thereof. The size of this mitigated area would depend on what it would take to compliment the existing ecosystem, but

could range from 8.2 to 32.8 acres under the existing provisions that call for the replacement of the lost quality of the converted wetlands with increase quantity in area of the replacement wetlands.

This would require on-site visits and cooperation with COE and IDEM if the Clean Water Act applies to this situation. I would expect a size requirement closer to the 32-acre range. These mitigation wetlands would be protected from conversion by the attachment of an easement to the deed. Your violation status would be renewed if the easement were not honored by the deed owner.

Our situation as it now stands is this – The Farm Services Agency has filed a request for a Report of Wetland Conservation Compliance (ASCS-569) with my office. I have determined that you converted 6.2 acres of wooded wetlands during 1998 in conflict with the 1996 Federal Agricultural Improvement and Reform Act. You also have an additional 2 acres of wetland that have not been converted. You have requested to make use of the USDA mediation process, which stops the other processes of determining violations and making appeals from being completed.

Our agency has not heard from the mediator or you about moving forward with the mediation process. Please contact us with what information you have as to the status of mediation so that we may schedule our participation accordingly. We also will need to contact the COE and IDEM so that they can participate if they find that your activities fall under the jurisdiction of the Clean Water Act. Their scheduling often requires a long lead time so the quicker you can let us know the easier it will be for us to make decisions within your timeline for reaching a resolution.

As always, should you have any questions or information that would help your situation please contact me immediately.

Sincerely,

/s/ Al Tinsley
AL TINSLEY
Wetland Conservationist
Attachments

Cc: Dwayne Howard, NRCS, Indianapolis State Office
Jerry Pearson, NRCS, Rochester Field Office
Martha Wilczynski, JF New and Associates, Walkerton, IN

[LOGO]

United States Department of Agriculture

Natural Resources Conservation Service

[Address Omitted In Printing]

July 30, 2001

Farm # Tract # 13598, 13599, 781, 980

Gene Horn
Street 5079 S 500 W
Kewanna IN 46939

Robert F. Baker
1808 W 500 N
Logansport, IN 46947

Dear Mrrs. Horn and Baker,

This is to notify you that as of the date of this letter, I am making a final technical determination that:

- Field(s) shown in Section II of the attached NRCS-CPA-026E, "Highly Erodible Land

and Wetland Conservation Determination," form contains wetland determinations with the labels/certifications as indicated. These areas met the criteria of hydric soils, wetland plants and soil or surface wetness.

We have enclosed a Final Technical Determination on Form CPA-026E and an aerial photo that includes your certified wetlands determination. Any areas shown in "NI" on the map have not been completed. This supersedes any previous USDA determinations and is valid as long as the land use remains in agriculture.

This wetland certification does not include "other waters of the United States' as defined by the Corps of Engineers, which include but are not limited to tidal waters, lakes, rivers, streams, mud flats, and intermittent and perennial streams which are regulated under the Clean Water Act. Contact the Corps of Engineers regarding needs for permits.

This final determination may be appealed to the Farm Service Agency County Committee (COC) at the address below. Your COC appeal rights begin when you receive this determination and last for 30 days. We will forward a copy of our administrative record to the county committee for their use in deciding your appeal, should you decide to appeal to the county committee.

Fulton FSA County Committee
1252 E 100 S
Rochester, IN 46975

If you are the owner of this tract and have a tenant, I urge you to discuss this letter and accompanying NRCS-CPA-026E with your tenant. Likewise, if you are tenant of this tract of land, I urge you to discuss this letter with your landlord.

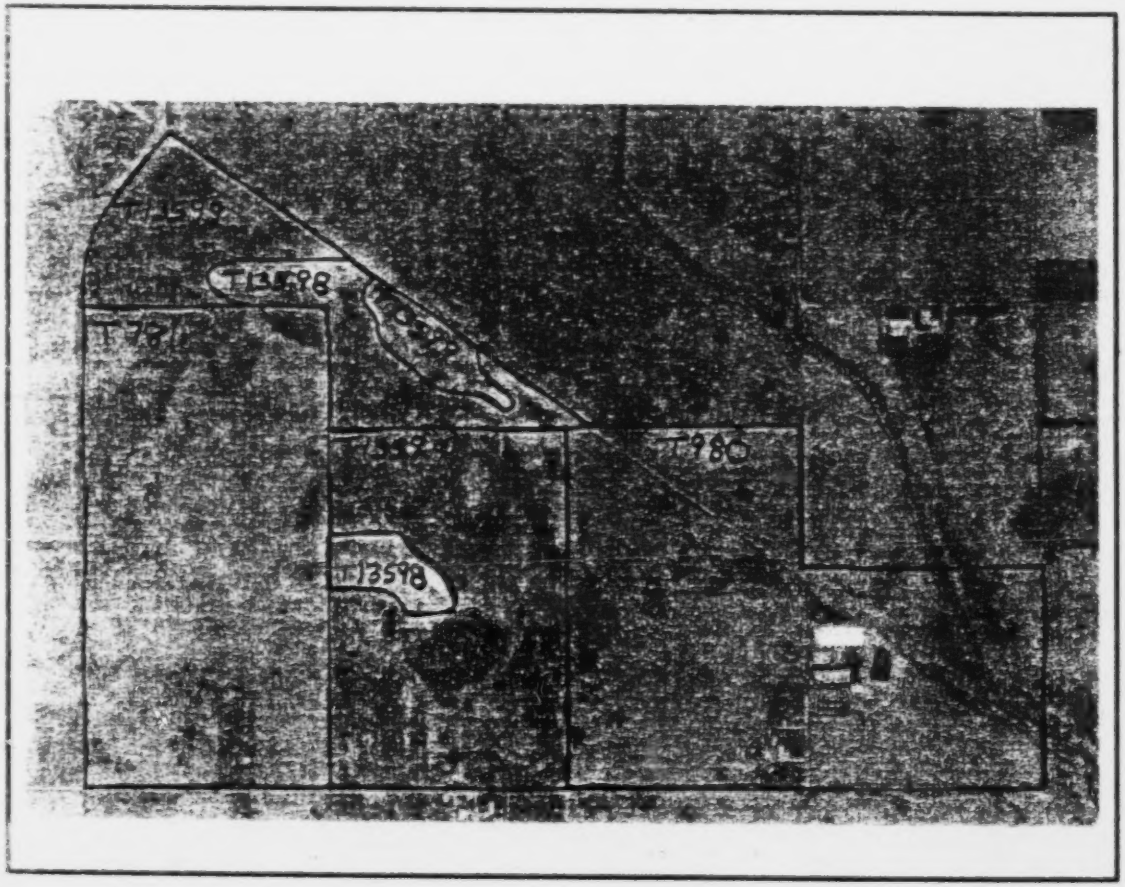
I would be happy to answer any questions or discuss any concerns you might have. Pleas stop by the office or call me at 219-223-3220.

Sincerely,

/s/ Daniel M. Rosswurm

ESRI ArcExplorer 2.0

Location of All Involved Tracts



Wednesday, Jun 6 2001

BEST AVAILABLE COPY

[LOGO] **United States Department of Agriculture** | **Natural Resources Conservation Service** | **NRCS-CPA-026E 9/2000**

HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION

Name Address:	Gene Horn 5079 S, 500 West Kewanna IN 46939	Request Date:	County: Fulton
Agency or Person Requesting Determination:	FSA/Horn	Tract No: 781	FSA Farm No.: 3954

Section I - Highly Erodible Land

Is a soil survey now available for making a highly erodible land determination?	–
Are there highly erodible soil map units on this farm?	–

Fields in this section have undergone a determination of whether they are highly erodible land (HEL) or not; fields for which an HEL Determination has not been completed are not listed. In order to be eligible for USDA benefits, a person must be using an approved conservation system on all HEL.

Field(s)	HEL(Y/N)	Sodbust (Y/N)	Acres	Determination Date
	–	–		
	–	–		
	–	–		
	–	–		
	–	–		

The Highly Erodible Land determination was completed in the –

Section II - Wetlands

Are there hydric soils on this farm?	Yes

Fields in this section have had wetland determinations completed. See the Definition of Wetland Label Codes for additional information regarding allowable activities under the wetland conservation provisions of the Food Security Act and/or when wetland determinations are necessary to determine USDA program eligibility.

Field(s)	Wetland Label*	Occurrence Year (CW)**	Acres	Determination Date	Certification Date
6	PC/NW		76.6	6/8/01	6/8/01
UN1 and UN2	NI		2	6/8/01	6/8/01
HS-Building lot	NW		2	6/8/01	6/8/01
	–				
	–				

The wetland determination was completed in the ___. It was ___, to the person on ___.

Remarks: Highlighted area in field #6 may qualify as a wetland under the jurisdiction of the COE subject to the Clean Water Act or IDEM subject to a NPDES (National Pollutant Discharge Elimination Systems) permit. It is not considered a wetland subject to the USDAmwetland conservation provisions of the amended 1985 Food Security Act. Contact NRCS before clearing or draining the wooded NI areas.

I certify that the above determinations are correct and were conducted in accordance with policies and procedures contained in the National Food Security Act Manual.

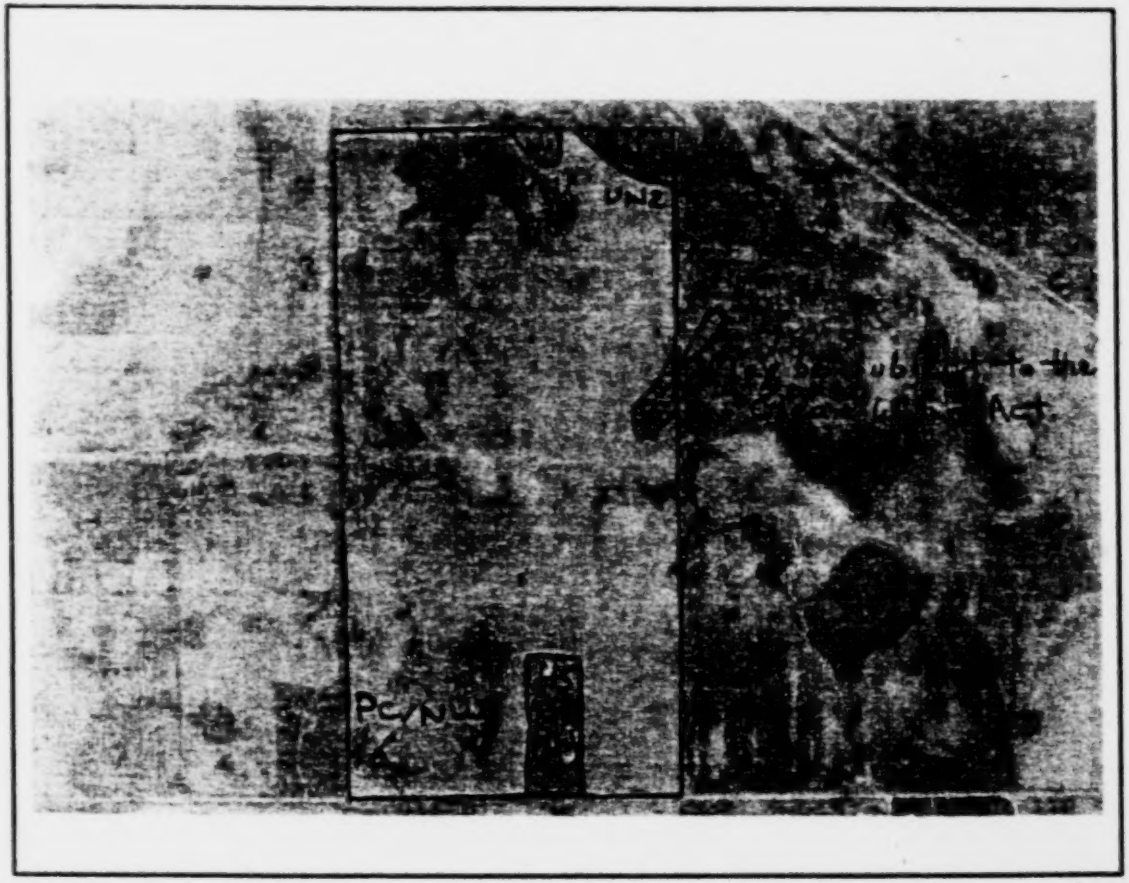
Signature Designated Conservationist	Date 30 July 01
/s/ Daniel M. Rosswurm	

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at 202-720-2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC 20250-9410 or call (202) 720-5964 (voice or TDD). USDA is an equal opportunity provider and employer.

ESRI ArcExplorer 2.0

Wetland Determination Designation Map - Tract 781



0 100 200

N

Wednesday, Jun 6 2001

[LOGO] **United States Department of Agriculture** | **Natural Resources Conservation Service** | **NRCS-CPA-026E 9/2000**

HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION

Name Address:	Gene Horn 5079 S, 500 West Kewanna IN 46939	Request Date:	County: Fulton
Agency or Person Requesting Determination:	FSA/Horn	Tract No: 13598	FSA Farm No.: 4085

Section I - Highly Erodible Land

Is a soil survey now available for making a highly erodible land determination?	–
Are there highly erodible soil map units on this farm?	–

Fields in this section have undergone a determination of whether they are highly erodible land (HEL) or not; fields for which an HEL Determination has not been completed are not listed. In order to be eligible for USDA benefits, a person must be using an approved conservation system on all HEL.

Field(s)	HEL(Y/N)	Sodbust (Y/N)	Acres	Determination Date
	–	–		
	–	–		
	–	–		
	–	–		
	–	–		

The Highly Erodible Land determination was completed in the –

Section II - Wetlands

Are there hydric soils on this farm?	Yes

Fields in this section have had wetland determinations completed. See the Definition of Wetland Label Codes for additional information regarding allowable activities under the wetland conservation provisions of the Food Security Act and/or when wetland determinations are necessary to determine USDA program eligibility.

Field(s)	Wetland Label*	Occurrence Year (CW)**	Acres	Determination Date	Certification Date
1 & 2	PC/NW		18 (12.8 & 5.2)	6/8/01	6/8/01
UN1	NI		.2	6/8/01	6/8/01
	–				
	–				
	–				

The wetland determination was completed in the ___. It was ___, to the person on ___.

Remarks: Contact NRCS before clearing or draining any wooded areas.

I certify that the above determinations are correct and were conducted in accordance with policies and procedures contained in the National Food Security Act Manual.

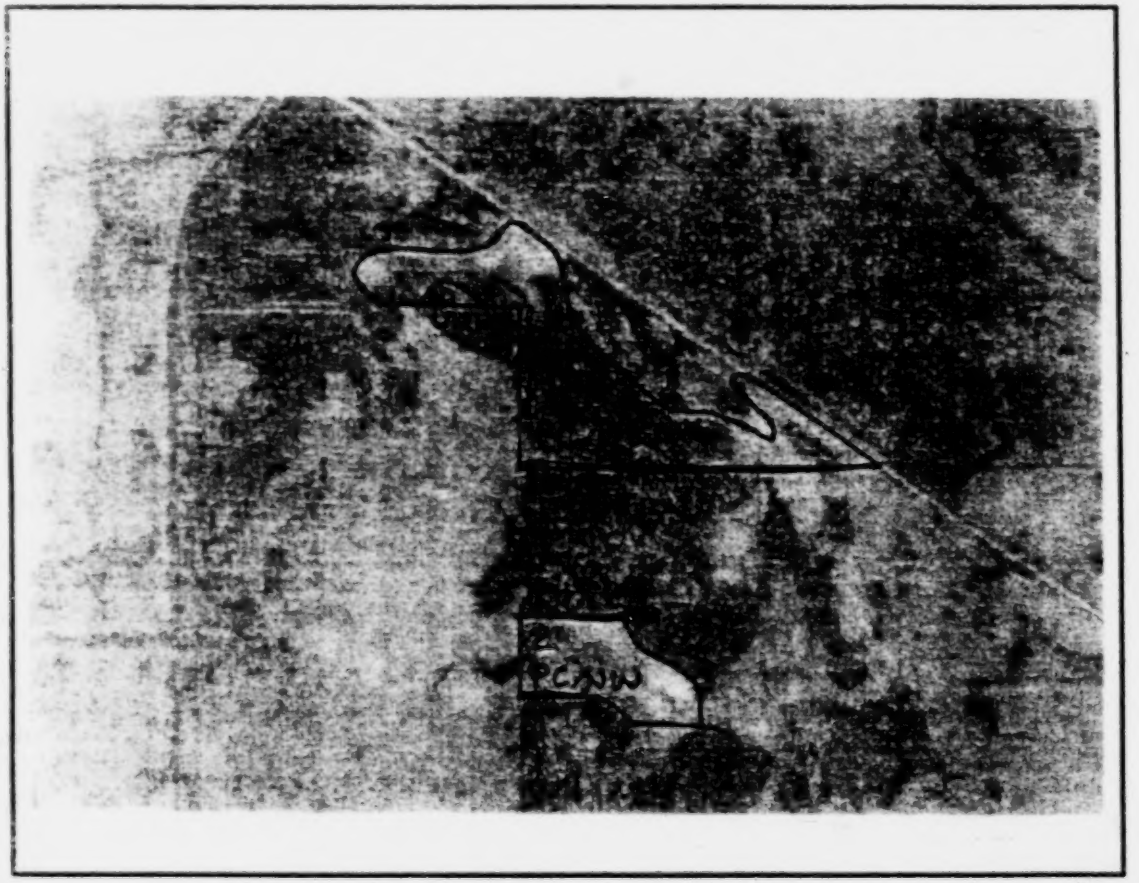
Signature Designated Conservationist	Date 30 July 01
/s/ Daniel M. Rosswurm	

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at 202-720-2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC 20250-9410 or call (202) 720-5964 (voice or TDD). USDA is an equal opportunity provider and employer.

ESRI ArcExplorer 2.0

Wetland Determination Designation Map - Tract 13598



0 100 200

N

Friday, Jun 8 2001

[LOGO] **United States Department of Agriculture** | **Natural Resources Conservation Service** | **NRCS-CPA-026E 9/2000**

HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION

Name Address:	Gene Horn 5079 S, 500 W Kewanna IN 46939	Request Date:	12/04/97	County:	Fulton
Agency or Person Requesting Determination:	FSA	Tract No:	13599	FSA Farm No.:	3472

Section I - Highly Erodible Land

Is a soil survey now available for making a highly erodible land determination?	–
Are there highly erodible soil map units on this farm?	–

Fields in this section have undergone a determination of whether they are highly erodible land (HEL) or not; fields for which an HEL Determination has not been completed are not listed. In order to be eligible for USDA benefits, a person must be using an approved conservation system on all HEL.

Field(s)	HEL(Y/N)	Sodbust (Y/N)	Acres	Determination Date
	–	–		
	–	–		
	–	–		
	–	–		
	–	–		

The Highly Erodible Land determination was completed in the –

Section II - Wetlands

Are there hydric soils on this farm?	Yes

Fields in this section have had wetland determinations completed. See the Definition of Wetland Label Codes for additional information regarding allowable activities under the wetland conservation provisions of the Food Security Act and/or when wetland determinations are necessary to determine USDA program eligibility.

Field(s)	Wetland Label*	Occurrence Year (CW)**	Acres	Determination Date	Certification Date
Fields 1, 5, & 6	PC/NW		47.9-4.5.3.8.39.6	5/22/98	5/22/98
UN1	NW		8	5/22/98	5/22/98
UN6a	NW		8	1/31/00	6/8/01
UN6b & UN6c	W		1.4-1.0, .4	1/31/00	6/8/01
UN areas 2.3.4.5	CW+yr	1998	4.8-.5,1.8,2.1,.4	4/28/99	4/28/99

The wetland determination was completed in the ___. It was ___, to the person on ___.

Remarks: Areas UN2, 3, 4, & 5 must be restored to wetland conditions or their loss mitigated before the CW penalty designation can be returned to a W. Existing title in these areas can be replaced with by-pass tiles around the wetlands or solid tiles throught the wetlands to allow field drainage to function, trees must be replanted.

I certify that the above determinations are correct and were conducted in accordance with policies and procedures contained in the National Food Security Act Manual.

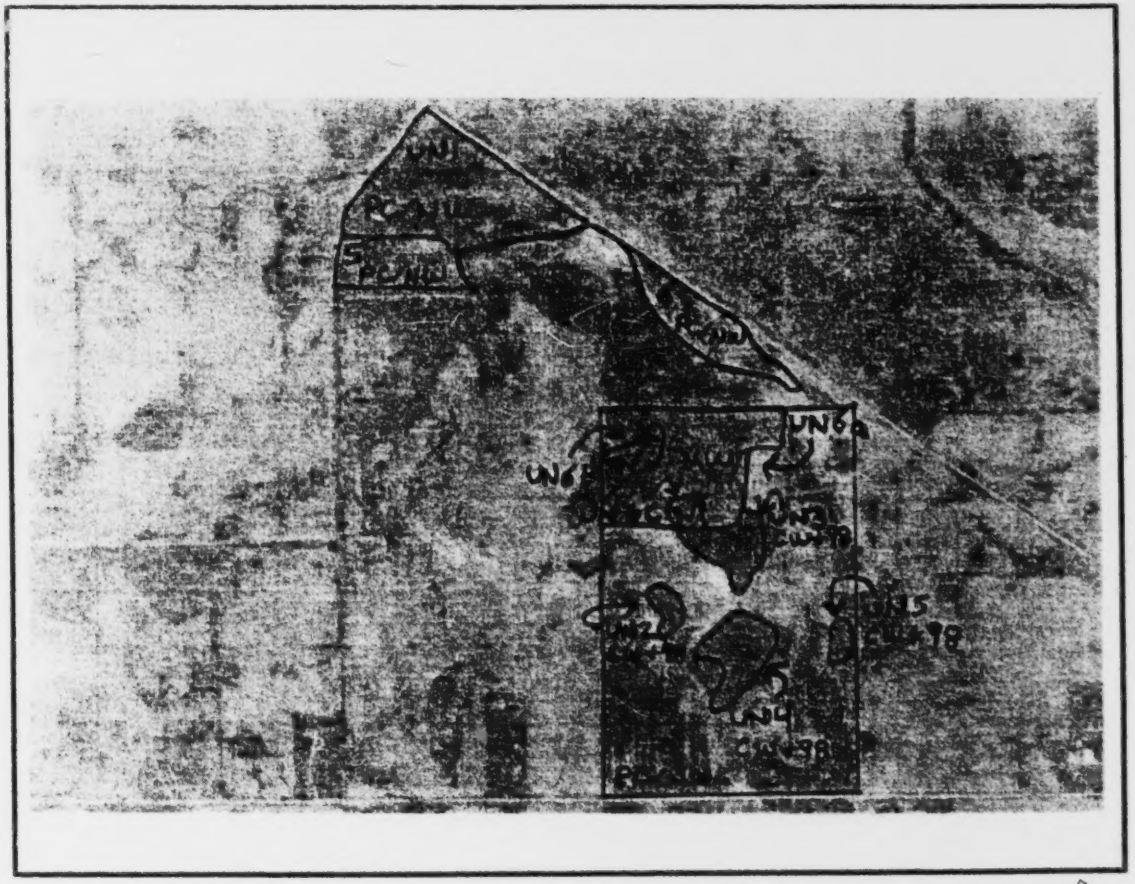
Signature Designated Conservationist	Date 30 July 01
/s/ Daniel M. Rosswurm	

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at 202-720-2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC 20250-9410 or call (202) 720-5964 (voice or TDD). USDA is an equal opportunity provider and employer.

ESRI ArcExplorer 2.0

Wetland Determination Designation Map - Tract 13599



Wednesday, Jun 6 2001

[LOGO] **United States Department of Agriculture** | **Natural Resources Conservation Service** | **NRCS-CPA-026E 9/2000**

HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION

Name Address:	Gene Horn 5079 S, 500 West Kewanna IN 46939	Request Date:	County: Fulton
Agency or Person Requesting Determination:	FSA/Horn	Tract No: 980	FSA Farm No.: 4085

Section I - Highly Erodible Land

Is a soil survey now available for making a highly erodible land determination?	–
Are there highly erodible soil map units on this farm?	–

Fields in this section have undergone a determination of whether they are highly erodible land (HEL) or not; fields for which an HEL Determination has not been completed are not listed. In order to be eligible for USDA benefits, a person must be using an approved conservation system on all HEL.

Field(s)	HEL(Y/N)	Sodbust (Y/N)	Acres	Determination Date
	–	–		
	–	–		
	–	–		
	–	–		
	–	–		

The Highly Erodible Land determination was completed in the –

Section II - Wetlands

Are there hydric soils on this farm?	Yes

Fields in this section have had wetland determinations completed. See the Definition of Wetland Label Codes for additional information regarding allowable activities under the wetland conservation provisions of the Food Security Act and/or when wetland determinations are necessary to determine USDA program eligibility.

Field(s)	Wetland Label*	Occurrence Year (CW)**	Acres	Determination Date	Certification Date
3, 4, 5, 6, 7	PC/NW		79.2	6/8/01	6/8/01
UN1	CW+yr	1998	1.4	6/8/01	6/8/01
UN2 & UN3	NI		.2 & .4	6/8/01	6/8/01
UN4	OW		.5	6/8/01	6/8/01
HS	NW		5	6/8/01	6/8/01

The wetland determination was completed in the ___. It was ___, to the person on ___.

Remarks: Area UN1 must be restored to wetland conditions or it's loss mitigated before the CW designation can be returned to a W. Existing tile in UN1 can be replaced with a by-pass tile around the wetland or a solid tile through the wetland to allow field drainage to function, riser must be removed. Contact NRCS before clearing or draining any wooded areas.

I certify that the above determinations are correct and were conducted in accordance with policies and procedures contained in the National Food Security Act Manual.

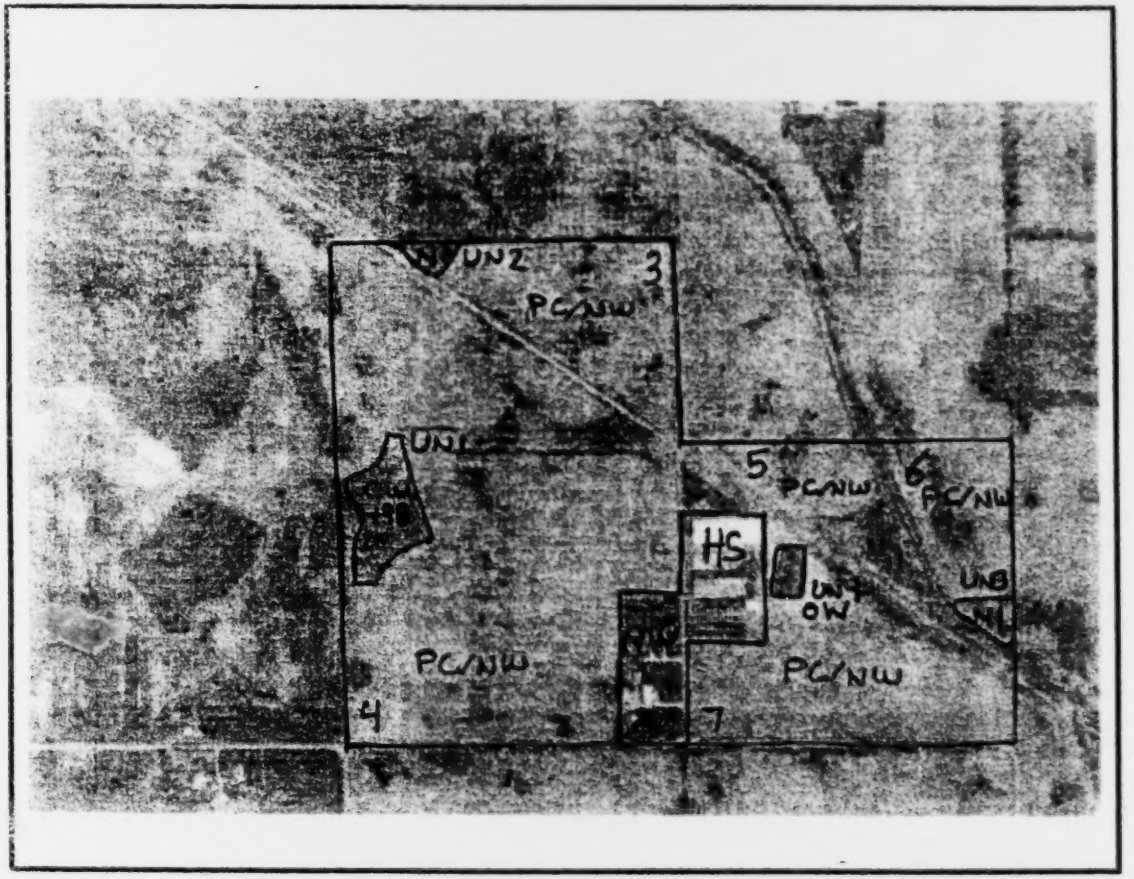
Signature Designated Conservationist	Date 30 July 01
/s/ Daniel M. Rosswurm	

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at 202-720-2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC 20250-9410 or call (202) 720-5964 (voice or TDD). USDA is an equal opportunity provider and employer.

ESRI ArcExplorer 2.0

Wetland Determination Designation Map - Tract 980



Feet

0

N

Wednesday, Jun 6 2001

***DEFINITIONS OF WETLAND LABEL CODES**

AW	Artificial Wetland. An area that is artificial or irrigation induced wetland. These wetlands are not subject to the wetland conservation provision.
AW/FW	An area that contains both AW and FW.
AW/W	An area that contains both AW and W.
CC	Commenced Conversion exemption.
CPD	Corps Permit Decision. Corps of Engineers permit decisions regarding section 404 of the Clean Water Act will be relied upon to satisfy the wetland conservation provisions of the Food Security Act of 1985, as amended.
CMW	An area that receives a Categorical Minimal Effect determination.
CW	Converted Wetlands. An area converted between December 23, 1985 and November 28, 1990. IN any year that an agricultural commodity is planted on these converted wetlands, you will ineligible for USDA benefits.
**CW+year	An area converted after November 28, 1990. You will be ineligible for USDA program benefits until this wetland is restored.
CWNA	Converted Wetland Non-Agricultural use. A wetland area converted to other than agricultural commodity production.
CWTE	Converted Wetland Technical Error. An area converted or commenced based on an incorrect NRCS determination or misinformation from a NRCS or FSA employee.
FW	Farmed Wetland. An area that is farmed wetland; was manipulated and planted before December 23, 1985 but still meets wetland criteria. These may be farmed and maintained in the same manner as long as they are not abandoned.

FWP	Farmed Wetlands Pasture. An area that is pasture or hayland, manipulated before December 23, 1985 but still meets wetland criteria. These may be farmed and maintained in the same manner as long as they are not abandoned.
MIW	Mitigation Wetlands. Wetlands on which a person is actively mitigating a frequently cropped area or a wetland converted between December 23, 1985 and November 28, 1990. A converted wetland, farmed wetland, or farmed wetland pasture on which functions and values were lost are compensated for through wetland restoration, enhancement or creation.
MW	Minimal effect Wetland. An area determined to be minimal effect. These wetlands are to be farmed according to the minimal-effect agreement signed at the time the minimal-effect determination was made,
MWM	An area determined to be minimal effect with mitigation.
NI	Not Inventoried – No wetland determination has been completed.
NW	Non-Wetland. An area that does not contain a wetland.
NW/NAD	An area determined to be a non-wetland resulting from a decision from the National Appeals Division.
OW	Other Waters of the U.S. Area that fall under the jurisdiction of the Clean Water Act.
PC	Prior Converted cropland, which was drained filled, or manipulated before December 23, 1985; was cropped prior to December 23, 1985; was not abandoned; and does not meet FW criteria. These are not subject to the wetland conservation provisions unless the area reverts to wetland as a result of abandonment.
PC/NW	An area that contains both PC and NW.

TP	Third Party Exemption.
W	Wetlands. An area meeting wetland criteria, including wetland farmed under natural conditions. If you plan to clear, drain, fill, level or manipulate these areas, contact NRCS and the Army Corp of Engineers prior to any such activity.
WX	A wetland area that has been manipulated after December 23, 1985, but was not, for the purpose of making production possible and production was not made possible. These include wetlands manipulated by drainage maintenance agreements.

[LOGO]

United States Department of Agriculture

Farm Service Agency

[Address Omitted In Printing]

September 12, 2001

Horn Farms, Inc.
5079S500W
Kewanna, IN 46939-9731

Dear Mr. Horn:

On July 30, 2001, the Fulton County Natural Resources Conservation Service (NRCS) made a Final Technical Determination of Wetland Conservation Compliance on Tract numbers 781, 980, 13598, and 13599 for you.

The effect of this determination on your participation or requested participation in any FSA administered program is as follows:

- tract nos. 980 and 13599 contain areas of wetlands which have been converted after 11-28-90.

NRCS has determined that the conversions took place in 1998. The conversion of these wetlands is a violation of the Food Security Act of 1985, therefore, this action results in your ineligibility in any FSA administered programs. Since this is a 1998 violation, you are now ineligible for all 1998 program payments which you may have received on this farm and any other farm on which you had an interest.

- Procedure states that if the action which caused the violation was the conversion of a wetland, then program benefits will be withheld for the crop or program year that equals the calendar year in which the wetland conversion activity took place, and all subsequent years until the wetland is restored or mitigated within twelve (12) months of signing the Wetland Mitigation Agreement.

The program rules which apply to this situation are contained in the Food Security Act of 1985. The 1985 Act, as amended, provides that, unless exempted, persons are ineligible for benefits under certain programs administered by USDA if they:

- plant an agricultural commodity on wetland that was converted after December 23, 1985, or

- convert a wetland after November 29, 1990, by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible.

The 1985 Act was amended by the 1996 Act to provide that persons who violate Wetland Conservation requirements shall not be found ineligible and a payment reduction will

not apply if conversion of wetland or planting an agricultural commodity on a converted wetland was in good faith and without intention to violate. A person who is determined to have acted in good faith shall be required in a reasonable period of time, not to exceed one (1) year, to implement the measures and practices necessary to be considered to be actively restoring the wetland to qualify for reinstatement of eligibility.

We hereby wish to acknowledge that, as per your letter of appeal, dated 08-29-01, you have indicated a request for a Good Faith Effort determination. If you still desire that the FSA County Committee give consideration to this request, **please come into the county FSA office in order to sign Form AD-1069, Good Faith Determination – Wetland Activity.** This form will then be completed by both FSA and NRCS in order for the County Committee to make a determination.

It is also noted in your letter of appeal that you have requested that the County Committee consider the result of the NRCS Final Technical Determination. An informal hearing by the County Committee will be conducted in the near future and the committee will, at that time, consider the merits of the case and determine whether or not to refer the case to the NRCS State Conservationist for a review of the technical determination.

As stated, an informal hearing by the County Committee will be held. Once the date and time has been determined, you, or your authorized representative, or both, will be invited to attend this hearing and submit any additional information in support of your requests, including the level of penalties involved with this case and your proposal of a settlement, as submitted on 05-25-01. At this hearing,

an NRCS official will also be present in order to explain the technical determination to the County Committee.

Sincerely,

/s/ Steven J. Rodenberg
Steven J. Rodenberg, CED
Fulton County FSA Office

cc: Budd-Falen Law Offices, P.C.
attn: Brandon L. Jensen
Albert Tinsley, NRCS
Daniel Rosswurn, NRCS

[LOGO]

United States Department of Agriculture
Farm Service Agency
[Address Omitted In Printing]

October 18, 2001

Horn Farms, Inc.
5079 S 500 W
Kewanna, IN 46939-9731

Dear Mr. Horn:

This responds to your request for an appeal of the Natural Resource Conservation Service's (NRCS) Final Technical Wetland Determination for tract numbers 13598, 13599, 781, and 980. This decision is based on the following factual determination and reasons:

The County Committee determined that merit could not be found in regards to making a recommendation that the NRCS technical determination be reviewed by the Indiana NRCS State Conservationist. It was also concurred upon that the Committee does not have the authority to reverse a technical determination by NRCS. Therefore, your request for a reversal has been denied.

If you believe our decision is erroneous, you have the following option:

You may appeal this determination to National Appeals Division (NAD) by filing a written request not later than 30 calendar days after the date you receive this notice in accordance with the NAD appeal procedures found at 7 CFR Part 11 (Code of Federal Regulations). If you appeal to NAD, you have the right to a hearing, which you or your representative may attend. Once a hearing with NAD begins, you waive any right you might have to reconsideration, appeal to FSA, and mediation. To appeal you must write to NAD at the following address, explaining why you believe this determination is erroneous, and provide a copy to FSA. You must personally sign your written appeal to NAD and include a copy of this letter.

Office of the Area Supervisor
National Appeals Division, USDA
Eastern Regional Office
8909 Purdue Road, Suite 240
Indianapolis, IN 46268

Regulations published in 7 CFR are available on the GPO web site at: http://www.access.gpo.gov/naralcfr/index.html.

The Committee hereby acknowledges your submission of the forms AD-1069, Good Faith Determination – Wetland Activity. These forms are being forwarded to NRCS for their processing and subsequent return to our office. Once the request forms have been returned to our office, the committee will then make a determination of Good Faith and will notify you of the decision.

The Committee also reviewed your request for a settlement proposal, however, the committee concurred that they do not have any authority to act on this request,

whereas, the committee would have the authority to make a recommendation for relief action of penalties being imposed. Any type of recommendation for relief action would be considered by the committee at the time of an adverse determination of Good Faith.

Please accept the aforementioned determinations by and for the County Committee.

Sincerely,

/s/ Steven J. Rodenberg
Steven J. Rodenberg, CED
Fulton County FSA Office

cc: Brandon L. Jensen✓
Albert Tinsley, NRCS
Daniel Rosswurm, NRCS
Allen Ellison, FSA District Director
Douglas Hovermale, Indiana State FSA Office

[LOGO]

United States Department of Agriculture
Office of the Secretary
National Appeals Division

January 24, 2002

Ms. Karen Budd-Falen
Budd-Falen Law Office, P.C.
300 East 18*th* Street
P.O. Box 346
Cheyenne, Wyoming 82001

Re: Case No. 2002E000258 Horn Farms, Inc.

Dear Ms. Budd-Falen:

This is in response to your request on behalf of your clients, Horn Farms Inc., for an appeal with the National

Appeals Division (NAD). Appeals before NAD are governed by Title 7 of the Code of Federal Regulations (7 CFR). Regulations at 7 CFR 11.1 and 11.3 provide rules for proceedings before NAD. Additionally, appeals of NRCS technical determinations are governed by Title 7 of the Code of Federal Regulations at 7 CFR Part 780, specifically Parts 780.2, 780.7, and 780.9.

I have reviewed the Farm Service Agency letter dated October 18, 2001, from Steven J. Rodenberg, County Executive Director, on behalf of the Fulton County FSA Committee (COC). Upon this review, I must deny your request for a review of the written record. There exits no authority to hold a hearing or review of the written record.

NAD has no jurisdiction in this matter because an appeal of the Fulton County Committee to not seek the NRCS State Conservationist to review the technical determination is of general applicability and policy. 7 CFR 780.9 allows the county committee to seek further review by the NRCS State Conservationist only when the county committee hears the appeal and agrees with the participant's appeal to the COC. The lack of jurisdiction is further substantiated in 7 CFR Part 780.2(c) which states that no reconsideration or appeal may be sought under this part of any general program provision or program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants. The regulations are quite clear that only if the county committee agrees with the participant shall the case be referred to the NRCS State Conservationist to review the matter and review the technical determination.

Additionally, the regulations are very specific in that the provisions of reconsideration and appeals with the county

and state committees exclude these opportunities for technical review appeals in 7 CFR Part 780.7(f).

In making this jurisdictional determination, NAD will consider additional information submitted by either the Agency or the Participant. Both the Agency and the Participant have 10 calendar days from the date of this request to: 1) submit a written statement that explains, in detail, why you believe NAD has jurisdiction in this matter; and, 2) Copies of supporting documents, policies, procedures and regulations. Please include a copy of this request with your information. If the requested information is not received within 15 calendar days from the date of this letter, a jurisdictional determination may be made without such information. Please send all information to:

Michael E. Jacobs
National Appeals Division
Post Office Box 6152
Fishers, Indiana 46038-6152

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-5964 (voice and TDD). USDA is an equal opportunity provider and employer.

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC

20250-9410 or call (202) 720-5964 (voice and TDD). USDA is an equal opportunity provider and employer.

Dated and mailed this 24th day of January 2002.

/s/ Michael E. Jacobs
Michael E. Jacobs
Hearing Officer
National Appeals Division

APPELLANT:
Horn Farms, Inc.
% Gene Horn
5079 S 500 W
Kewanna, Indiana 46939

APPELLANT'S REPRESENTATIVE:
Brandon L. Jensen
Budd-Falen Law Office, P.C.
300 East 18th Street
P.O. Box 346
Cheyenne, Wyoming 82001

AGENCY APPEALS COORDINATOR:
Indiana FSA State Office

AGENCY DECISION MAKER/REPRESENTATIVE:
Douglas Hovermale
USDA Farm Service Agency
5981 Lakeside Blvd.
Indianapolis, Indiana 46278

NAD Eastern Regional Office

[LOGO]

United States Department of Agriculture
Office of the Secretary
National Appeals Division

February 20, 2002

Ms. Karen Budd-Falen
Budd-Falen Law Office, P.C.
300 East 18th Street
P.O. Box 346
Cheyenne, Wyoming 82001

RE: Case No. 2002E000258 Horn Farms, Inc.

Dear Ms. Budd-Falen:

This is in response to your request on behalf of your clients, Horn Farms Inc., for an appeal with the National Appeals Division (NAD).

Administrative appeals before NAD are governed by Title 7 of the Code of Federal Regulations (7 CFR). Regulations at 7 CFR 11.1 and 11.3 provide rules for proceedings before NAD. Additionally, appeals of Natural Resources Conservation Service (NRCS) technical determinations are governed by Title 7 of the Code of Federal Regulations at 7 CFR Part 780, specifically Parts 780.2, 780.7, and 780.9.

On January 24, 2002, I sent a letter that it was my opinion that NAD has no jurisdiction in this matter. There exits no authority to hold a hearing or review of the written record on the denial of the Fulton County FSA Committee (COC) to agree to seek a technical review by the Indiana NRCS State Conservationist.

You have responded by submitting the letter dated February 1, 2002. I have specifically reviewed and considered all documents received.

This Hearing Officer remains convinced that NAD has no jurisdiction in this matter because an appeal of the COC to not seek the NRCS State Conservationist to review the technical determination is of general applicability and policy. 7 CFR 780.9 allows the county committee to seek further review by the NRCS State Conservationist only when the county committee hears the appeal and agrees with the participant's appeal to the COC. The record shows the only issue in the adverse action letter was the fact the COC did not agree to the recommendation. There is nothing else to adjudicate.

You participated in an appeal with the COC. The COC determined they could not recommend that the NRCS technical determination be reviewed by the Indiana NRCS State Conservationist. The regulations provide that only if the COC agrees with the participant shall the case be referred to the NRCS State Conservationist to review the matter and review the technical determination. You continue to seek a determination on a matter which, when rendered, cannot have any practical effect on the existing controversy. The regulations do not provide any cognizable form of relief as the NRCS State Conservationist can review the matter and the technical determination only if the COC agrees. It is clear in the adverse action letter of October 18, 2001, the COC did not agree.

The lack of jurisdiction is further substantiated in 7 CFR Part 780.2(c) which states that no reconsideration or appeal may be sought under this part of any general program provision or program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants. The regulations are very specific in that the provisions of reconsideration and appeals with the

county and state committees exclude these opportunities for technical review appeals in 7 CFR Part 780.7(f).

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital, or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-5964 (voice and TDD). USDA is an equal opportunity provider and employer.

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC 20250-9410 or call (202) 720-5964 (voice and TDD). USDA is an equal opportunity provider and employer.

If you believe this determination is in error you may request a review by writing to the Director of the National Appeals Division. Your request must be submitted not later than 30 days after you receive this determination. You must send a copy of your request to the Agency representative at the same time your request is sent to the Director. Send your request to the Director at the following address:

Director
National Appeals Division
8909 Purdue Road Suite 240
Indianapolis, Indiana 46268

Dated and mailed this 20th day of February 2002.

/s/ Michael E. Jacobs
Michael E. Jacobs
Hearing Officer
National Appeals Division

APPELLANT:
Horn Farms, Inc.
C/o Gene Horn
5079 S 500 W
Kewanna, Indiana 46939

APPELLANT'S REPRESENTATIVE:
Brandon L. Jensen
Budd-Falen Law Office, P.C.
300 East 18th Street
P.O. Box 346
Cheyenne, Wyoming 82001

AGENCY APPEALS COORDINATOR:
Indiana FSA State Office

AGENCY DECISION MAKER/REPRESENTATIVE:
Douglas Hovermale
USDA Farm Service Agency
5981 Lakeside Blvd.
Indianapolis, Indiana 46278

NAD Eastern Regional Office

UNITED STATES DEPARTMENT OF AGRICULTURE
NATIONAL APPEALS DIVISION

In the Matter of Horn Farms, Inc. (Appellant) and Farm Service Agency (Agency)	)	Case No. 2002E000258

DENIAL OF A DIRECTOR REVIEW REQUEST

Be advised that the Appellant has requested a Director review of the Hearing Officer's determination that was issued on February 20, 2002. The request does not satisfy the requirements of Title 7 of the Code of Federal Regulations (CFR), § 11.9; specifically:

> the Appellant did not personally sign the request for a Director review.

The request may be reconsidered if the above requirement is satisfied within the statutory timeframe to request a Director review.

The Appellant may submit the documents to the address below:

> National Appeals Division
> Eastern Regional Office
> 8909 Purdue Road, Suite 240
> Indianapolis, IN 46268
> FAX: 317-875-9674

Procedural inquiries or questions should be directed to 317-875-9648.

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC 20250-9410 or call (202) 720-5964 (voice and TDD). USDA is an equal opportunity provider and employer.

Dated this 22nd day of March, 2002.

/s/ Natalie J. German, Acting
WILLIAM A. CRUTCHFIELD
Assistant Director
Eastern Region
National Appeals Division

Copies of this Notice dated and mailed postage paid:

Appellant, Gene Horn, 5079 South 500 West, Kewanna, Indiana 46939

Appellant's Rep., Brandon Jensen, PO Box 346, Cheyenne WY 82001-0346

State Appeals Coordinator/FSA/Indiana (Douglas Hovermale)

NAD Hearing Officer/Michael E. Jacobs
Agency DM. Steven J. Rodenberg
USDA – Fulton County FSA Office
1252 East 100 South, Suite E
Rochester, Indiana 46975

Administrator, USDA, Farm Service Agency, Appeals & Litigation Group,
Stop 570, Room 6722, 1400 Independence Ave. SW,
Washington DC 20250-0570

UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL APPEALS DIVISION

In the Matter of Horn Farms, Inc. (Appellant) and Farm Service Agency (Agency)	)))))	Case No. 2002E000258

NOTICE THAT A DIRECTOR REVIEW REQUEST HAS BEEN DENIED

Be advised the Appellant has requested a Director review of the Hearing Officer's determination that was issued on February 20, 2002. The request does not satisfy the requirements of Title 7 of the Code of Federal Regulations (CFR), § 11.9; specifically:

> The Appellant did not request a Director Review within the time limit established by the regulations: 30 days after receipt of the Hearing Officer's Appeal Determination.

Therefore, the request is denied.

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC 20250-9410 or call (202) 720-5964 (voice and TDD). USDA is an equal opportunity provider and employer.

Dated this 28th day of March 2002.

/s/ Natalie J. German
WILLIAM A. CRUTCHFIELD SR.
Assistant Director
Eastern Region
National Appeals Division

Copies of this Notice dated and mailed postage paid:

Appellant, Gene Horn, 5079 South 500 West, Kewanna, Indiana 46939

Appellant's Rep. Brandon Jensen, PO Box 346, Cheyenne, WY 82003-0346

State Appeals Coordinator, FSA, Indiana

Decision Maker, Steven J. Rodenberg
USDA – Fulton County FSA Office
1252 East 100 South, Suite E
Rochester, Indiana 46975

Agency Head, USDA, Farm Service Agency, Appeals & Litigation Group,
STOP 0570, Room 6722, 1400 Independence Avenue, SW
Washington, DC 20250-0570
Hearing Officer, Michael E. Jacobs

APPENDIX D

Field Trip Notes

Owner: Gene Horn
5079 S 500 W
Kewana IN 46939

Date of Visit: 3-22-99

I visited the site with Gene Horn and Robert Baker. They showed me five sites that had been cleared of trees and, with the exception of one site, had been prepared for row crops. The field is a complex of sandy ridges and mucky depressions. Six of these depressions had been in trees from prior to 1981, according to the slides reviewed, until last year. The exception, site 2, had growing cat-tails and rushes due to continuing inundation and saturation.

All five bore evidence of being converted wetlands; actual saturation inspite of having tile systems and risers installed and the remnants of wetland plants in the form of twigs, sticks, root wads, and in some areas, surviving plants.

The sites also bore evidence of past drainage in the form of tile chips and broken pieces. However, since these areas were all in mature trees prior to 1981, there is no evidence that the drainage systems were actually working during or prior to 1981. The applicants were asked to provide, but had no knowledge of any evidence that these areas were dry enough to be considered Non-wetlands during 1981 to 1985 or within the last five years.

One area in question; Site 2 had had several tall mature trees pushed out into the woods north of the site. The trees were dead and so aged that I could not give a 100% positive

accurate identification, though they appeared to be Cottonwoods. The applicant claimed that there had been Sassafras trees in the area. I found no such evidence of Sassafras within the site but did find them in the woods immediately uphill from the site in the higher topography. The bark of very mature Sassafras trees can resemble that of Cottonwood. Any possibility that these dead trees were Sassafras (which is an upland tree) is not considered evidence that their former location is a Non-Wetland because they were all long dead, most obviously from wetness that appeared to be excessive even for Cottonwoods.

The chronology of this field appears to be that it was drained many decades ago, the system stopped functioning, trees had returned sometime no later than in the 1970's and were not suitable for a determination of PC during the pertinent 1981-1985 time frame for purposes of the Farm Bill provisions or the 1993-1998 time frame for purposes of the Clean Water Act.

APPENDIX E

UNITED STATES CODE

1982 EDITION

SUPPLEMENT III

JANUARY 15, 1983, TO JANUARY 20, 1986

16 U.S.C. § 3821. Program ineligibility

Except as provided in section 3822 of this title and notwithstanding any other provision of law, following December 23, 1985, any person who in any crop year produces an agricultural commodity on converted wetland shall be ineligible for –

(1) as to any commodity produced during that crop year by such person –

(A) any type of price support or payment made available under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), the Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.), or any other Act;

(B) a farm storage facility loan made under section 4(h) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b(h));

(C) crop insurance under the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.);

(D) a disaster payment made under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.); or

(E) a loan made, insured, or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) or any other provision of law administered by the Farmers Home Administration, if the Secretary determines that the proceeds of such loan will be used

for a purpose that will contribute to conversion of wetlands (other than as provided in this subchapter) to produce an agricultural commodity; or

(2) a payment made under section 4 or 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b or 714c) during such crop year for the storage of an agricultural commodity acquired by the Commodity Credit Corporation.

---

16 U.S.C. § 3822. Exemptions

(a) Persons eligible for program benefits in connection with production of crops on certain wetlands

No person shall become ineligible under section 3821 of this title for program loans, payments, and benefits as the result of the production of a crop of an agricultural commodity on –

(1) converted wetland if the conversion of such wetland was commenced before December 23, 1985;

(2) an artificial lake, pond, or wetland created by excavating or diking non-wetland to collect and retain water for purposes such as water for livestock, fish production, irrigation (including subsurface irrigation), a settling basin, cooling, rice production, or flood control;

(3) a wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation; or

(4) wetland on which production of an agricultural commodity is possible as a result of a natural

condition, such as drought, and without action by the producer that destroys a natural wetland characteristic.

* * *

UNITED STATES CODE

1988 EDITION

SUPPLEMENT II

JANUARY 3, 1989, TO JANUARY 2, 1991

16 U.S.C. § 3821. Program ineligibility

(a) Except as provided in section 3822 of this title and notwithstanding any other provision of law, following December 23, 1985, any person who in any crop year produces an agricultural commodity on converted wetland shall be ineligible for –

(1) as to any commodity produced during that crop year by such person –

(A) any type of price support or payment made available under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), the Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.), or any other Act;

(B) a farm storage facility loan made under section 4(h) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b(h));

(C) crop insurance under the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.);

(D) a disaster payment made under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), under section 132 of the Disaster Assistance Act of 1989 [7 U.S.C. 1421 note], or under any similar

provision enacted subsequent to August 14, 1989; or

(E) a loan made, insured, or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) or any other provision of law administered by the Farmers Home Administration, if the Secretary determines that the proceeds of such loan will be used for a purpose that will contribute to conversion of wetlands (other than as provided in this subchapter) to produce an agricultural commodity;

(2) a payment made under section 4 or 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b or 714c) during such crop year for the storage of an agricultural commodity acquired by the Commodity Credit Corporation; or

(3) during such crop year –

(A) a payment made under section 590h, section 590*l* or section 590p(b) of this title;

(B) a payment under section 2201 or section 2202 of this title;

(C) a payment under any contract entered into pursuant to 3831 of this title;

(D) a payment under part II of subchapter IV of this chapter;

(E) a payment under part III of subchapter IV of this chapter; or

(F) a payment, loan or other assistance under section 1003 or section 1006a of this title.

(b) Except as provided in section 3822 of this title and notwithstanding any other provision of law, any

person who in any crop year subsequent to November 28, 1990, converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland shall be ineligible for those payments, loans, or programs specified in subsection (a)(1) through (3) of this section for that crop year and all subsequent crop years.

---

16 U.S.C. § 3822. Delineation of wetlands; exemptions

* * *

(b) Exemptions

No person shall become ineligible under section 3821 of this title for program loans, payments, and benefits –

(1) as the result of the production of an agricultural commodity on –

(A) converted wetland if the conversion of such wetland was commenced before December 23, 1985;

(B) an artificial lake, pond, or wetland created by excavating or diking nonwetland to collect and retain water for purposes such as water for livestock, fish production, irrigation (including subsurface irrigation), a settling basin, cooling, rice production, or flood control;

(C) a wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation; or

(D) wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce an agricultural commodity in a manner

that is consistent for the area where such production is possible as a result of a natural condition, such as drought, and is without action by the producer that destroys a natural wetland characteristic; or

(2) for the conversion of –

(A) an artificial lake, pond, or wetland created by excavating or diking nonwetland to collect and retain water for purposes such as water for livestock, fish production, irrigation (including subsurface irrigation), a settling basin, cooling, rice production, or flood control; or

(B) a wet area created by a water delivery system, irrigation, irrigation system, or the application of water for irrigation.

* * *

UNITED STATES CODE

1994 EDITION

SUPPLEMENT IV

JANUARY 4, 1995, TO JANUARY 5, 1999

16 U.S.C. § 3821. Program ineligibility

(a) Production on converted wetland

Except as provided in this subchapter and notwithstanding any other provision of law, any person who in any crop year produces an agricultural commodity on converted wetland, as determined by the Secretary, shall be –

(1) in violation of this section; and

(2) ineligible for loans or payments in an amount determined by the Secretary to be proportionate to the severity of the violation.

(b) Ineligibility for certain loans and payments

If a person is determined to have committed a violation under subsection (a) of this section during a crop year, the Secretary shall determine which of, and the amount of, the following loans and payments for which the person shall be ineligible:

(1) Contract payments under a production flexibility contract, marketing assistance loans, and any type of price support or payment made available under the Agricultural Market Transition Act [7 U.S.C. § 7201 et seq.], the Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.), or any other Act.

(2) A loan made or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) or any other provision of law administered by the Consolidated Farm Service Agency, if the Secretary determines that the proceeds of the loan will be used for a purpose that will contribute to conversion of a wetland (other than as provided in this subchapter) to produce an agricultural commodity.

(3) During the crop year:

(A) A payment made pursuant to a contract entered into under the environmental quality incentives program under part IV of subchapter IV of this chapter.

(B) A payment under any other provision of subchapter IV of this chapter.

(C) A payment under section 2201 or 2202 of this title.

(D) A payment, loan, or other assistance under section 1003 or 1006a of this title.

(c) Wetland conversion

Except as provided in section 3822 of this title and notwithstanding any other provision of law, any person who in any crop year beginning after November 28, 1990, converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland shall be ineligible for those payments, loans, or programs specified in subsection (b) of this section for that crop year and all subsequent crop years.

(d) Prior loans

This section shall not apply to a loan described in subsection (b) of this section made before December 23, 1985.

---

16 U.S.C. § 3822. Delineation of wetland's; exemptions

* * *

(b) Exemptions

No person shall become ineligible under section 3821 of this title for program loans or payments under the following circumstances:

(1) As the result of the production of an agricultural commodity on the following lands:

(A) A converted wetland if the conversion of the wetland was commenced before December 23, 1985.

(B) Land that is a nontidal drainage or irrigation ditch excavated in upland.

(C) A wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation.

(D) A wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area where the production is possible as a result of a natural condition, such as drought, and is without action by the producer that destroys a natural wetland characteristic.

(E) Land that is an artificial lake or pond created by excavating or diking land (that is not a wetland) to collect and retain water and that is used primarily for livestock watering, fish production, irrigation, wildlife, fire control, flood control, cranberry growing, or rice production, or as a settling pond.

(F) A wetland that is temporarily or incidentally created as a result of adjacent development activity.

(G) A converted wetland if the original conversion of the wetland was commenced before December 23, 1985, and the Secretary determines the wetland characteristics returned after that date as a result of –

(i) the lack of maintenance of drainage, dikes, levees, or similar structures;

(ii) a lack of management of the lands containing the wetland; or

(iii) circumstances beyond the control of the person.

(H) A converted wetland, if –

(i) the converted wetland was determined by the Natural Resources Conservation Service to have been manipulated for the production of

an agricultural commodity or forage prior to December 23, 1985, and was returned to wetland conditions through a voluntary restoration, enhancement, or creation action subsequent to that determination;

(ii) technical determinations regarding the prior site conditions and the restoration, enhancement, or creation action have been adequately documented by the Natural Resources Conservation Service;

(iii) the proposed conversion action is approved by the Natural Resources Conservation Service prior to implementation; and

(iv) the extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed prior to implementation of the voluntary wetland restoration, enhancement, or creation action.

(2) For the conversion of the following:

(A) An artificial lake or pond created by excavating or diking land that is not a wetland to collect and retain water and that is used primarily for livestock watering, fish production, irrigation, wildlife, fire control, flood control, cranberry growing, rice production, or as a settling pond.

(B) A wetland that is temporarily or incidentally created as a result of adjacent development activity.

(C) A wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area where the production is possible as a result of a natural condition,

such as drought, and is without action by the producer that destroys a natural wetland characteristic.

(D) A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date as a result of –

(i) the lack of maintenance of drainage, dikes, levees, or similar structures;

(ii) a lack of management of the lands containing the wetland; or

(iii) circumstances beyond the control of the person.

(E) A wetland, if –

(i) the wetland was determined by the Natural Resources Conservation Service to have been manipulated for the production of an agricultural commodity or forage prior to December 23, 1985, and was returned to wetland conditions through a voluntary restoration, enhancement, or creation action subsequent to that determination;

(ii) technical determinations regarding the prior site conditions and the restoration, enhancement, or creation action have been adequately documented by the Natural Resources Conservation Service;

(iii) the proposed conversion action is approved by the Natural Resources Conservation Service prior to implementation; and

(iv) the extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed prior to implementation of the voluntary wetland restoration, enhancement, or creation action.

APPENDIX F
CODE OF FEDERAL REGULATIONS

Agriculture

AS OF JANUARY 1, 1999

7 C.F.R. § 12.1 General.

(a) *Scope.* This part sets forth the terms and conditions under which a person who produces an agricultural commodity on highly erodible land or designates such land for conservation use, plants an agricultural commodity on a converted wetland, or converts a wetland shall be determined to be ineligible for certain benefits provided by the United States Department of Agriculture (USDA) and agencies and instrumentalities of USDA.

(b) *Purpose.* The purpose of the provisions of this part are to remove certain incentives for persons to produce agricultural commodities on highly erodible land or converted wetland and to thereby –

(1) Reduce soil loss due to wind and water erosion;

(2) Protect the Nation's long-term capability to produce food and fiber;

(3) Reduce sedimentation and improve water quality; and

(4) Assist in preserving the functions and values of the Nation's wetlands.

---

7 C.F.R. § 12.2 Definitions.

(a) *General.* The following definitions shall be applicable for the purposes of this part:

Agricultural commodity means any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane.

CCC means the Commodity Credit Corporation, a wholly-owned government corporation within USDA organized under the provisions of 15 U.S.C. 714 *et seq.*

Conservation District (CD) means a subdivision of a State or local government organized pursuant to the applicable law to develop and implement soil and water conservation activities or programs.

Conservation plan means the document that –

(1) Applies to highly erodible cropland;

(2) Describes the conservation system applicable to the highly erodible cropland and describes the decisions of the person with respect to location, land use, tillage systems, and conservation treatment measures and schedules; and

(3) Is approved by the local soil conservation district in consultation with the local committees established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h (b)(5)) and the Natural Resources Conservation Service (NRCS) for purposes of compliance with this part.

Conservation system means a combination of one or more conservation measures or management practices that are –

(1) Based on local resource conditions, available conservation technology, and the standards and guidelines contained in the NRCS field office technical guides (available from NRCS State offices); and

(2) Designed for purposes of this part to achieve, in a cost-effective and technically practicable manner, a substantial reduction in soil erosion or a substantial improvement in soil conditions on a field or group of fields containing highly erodible cropland when compared to the level of erosion or soil conditions that existed before the application of the conservation measures and management practices.

Conservation use or set aside means cropland that is designated as conservation-use acreage, set aside, or other similar designation for the purpose of fulfilling provisions under any acreage-limitation or land-diversion program administered by the Secretary of Agriculture requiring that the producer devote a specified acreage to conservation or other non-crop production uses.

Creation of a wetland means the development of the hydrologic, geochemical, and biological components necessary to support and maintain a wetland where a wetland did not previously exist. Any wetland established on a non-hydric soil will be considered a created wetland.

CSREES means the Cooperative State Research, Education, and Extension Service, an agency of USDA which is generally responsible for coordinating the information and educational programs of USDA.

Department means the United States Department of Agriculture (USDA).

Enhancement of a wetland means the alteration of an existing wetland to increase its specific functions and values. Enhancement actions include new capabilities, management options, structures, or other actions to influence one or several functions and values.

Erodibility index means a numerical value that expresses the potential erodibility of a soil in relation to its soil loss tolerance value without consideration of applied conservation practices or management.

FSA means the Farm Service Agency, an agency of USDA which is generally responsible for administering commodity production adjustment and certain conservation programs of USDA.

Field means a part of a farm that is separated from the balance of the farm by permanent boundaries such as fences, roads, permanent waterways, or other similar features. At the option of the owner or operator of the farm, croplines may also be used to delineate a field if farming practices make it probable that the croplines are not subject to change. Any highly erodible land on which an agricultural commodity is produced after December 23, 1985, and is not exempt under § 12.5(a), shall be considered part of the field in which the land was included on December 23, 1985, unless to carry out this title, the owner and FSA agree to modify the boundaries of the field.

Highly erodible land means land that has an erodibility index of 8 or more.

Hydric soils means soils that, in an undrained condition, are saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that

supports the growth and regeneration of hydrophytic vegetation.

Hydrophytic vegetation means plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

Landlord means a person who rents or leases farmland to another person.

Local FSA office means the county office of the Farm Service Agency serving the county or a combination of counties in the area in which a person's land is located for administrative purposes.

NRCS means the Natural Resources Conservation Service, an agency within USDA which is generally responsible for providing technical assistance in matters of natural resources conservation and for administering certain conservation programs of USDA.

Operator means the person who is in general control of the farming operations on the farm during the crop year.

Owner means a person who is determined to have legal ownership of farmland and shall include a person who is purchasing farmland under contract.

Person means an individual, partnership, association, corporation, cooperative, estate, trust, joint venture, joint operation, or other business enterprise or other legal entity and, whenever applicable, a State, a political subdivision of a State, or any agency thereof, and such person's affiliates as provided in § 12.8 of this part.

Restoration of a wetland means the re-establishment of wetland conditions, including hydrologic condition or native hydrophytic vegetation, to an area where a wetland had previously existed.

Secretary means the Secretary of USDA.

Sharecropper means a person who performs work in connection with the production of a crop under the supervision of the operator and who receives a share of such crop for such labor.

Soil map unit means an area of the landscape shown on a soil map which consists of one or more soils.

State means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

Tenant means a person usually called a "cash tenant", "fixed-rent tenant", or "standing rent tenant" who rents land from another for a fixed amount of cash or a fixed amount of a commodity to be paid as rent; or a person (other than a sharecropper) usually called a "share tenant" who rents land from another person and pays as rent a share of the crops of proceeds therefrom. A tenant shall not be considered the farm operator unless the tenant is determined to be the operator pursuant to this part and 7 CFR part 718.

Wetland, except when such term is a part of the term "converted wetland", means land that –

(1) Has predominance of hydric soils;

(2) Is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and

(3) Under normal circumstances does support a prevalence of such vegetation except that this term does not include lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils.

Wetland determination means a decision regarding whether or not an area is a wetland, including identification of wetland type and size. A wetland determination may include identification of an area as one of the following types of wetland –

(1) *Artificial wetland* is an area that was formerly non-wetland, but now meets wetland criteria due to human activities, such as:

(i) An artificial lake or pond created by excavating or diking land that is not a wetland to collect and retain water that is used primarily for livestock, fish production, irrigation, wildlife, fire control, flood control, cranberry growing, or rice production, or as a settling pond; or

(ii) A wetland that is temporarily or incidentally created as a result of adjacent development activity;

(2) *Commenced-conversion wetland* is a wetland, farmed wetland, farmed-wetland pasture, or a converted wetland on which conversion began, but was not completed, prior to December 23, 1985.

(3) *Converted wetland* is a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulations described herein if:

(i) Such production would not have been possible but for such action, and

(ii) Before such action such land was wetland, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland;

(4) *Farmed wetland* is a wetland that prior to December 23, 1985, was manipulated and used to produce an agricultural commodity, and on December 23, 1985, did not support woody vegetation and met the following hydrologic criteria:

(i) Is inundated for 15 consecutive days or more during the growing season or 10 percent of the growing season whichever is less, in most years (50 percent chance or more), or

(ii) If a pothole, playa, or pocosion, is ponded for 7 or more consecutive days during the growing season in most years (50 percent chance of more) or is saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more);

(5) *Farmed-wetland pasture* is wetland that was manipulated and managed for pasture or hayland prior to December 23, 1985, and on December 23, 1985, met the following hydrologic criteria:

(i) Inundated or ponded for 7 or more consecutive days during the growing season in most years (50) percent chance or more), or

(ii) Saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more);

(6) *Not-inventoried land*, is an area for which no evaluation of soils, vegetation, or hydrology has been conducted to determine if wetland criteria are met;

(7) *Non-wetland* is;

(i) Land that under natural conditions does not meet wetland criteria, or

(ii) Is converted wetland the conversion of which occurred prior to December 23, 1985, and on that date, the land did not meet wetland criteria but an agricultural commodity was not produced and the area was not managed for pasture or hay;

(8) *Prior-converted cropland* is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:

(i) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and

(ii) If a pothole, playa or pocosin, ponding was less than 7 consecutive days during the growing season in most

years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season most years (50 percent chance or more); or

(9) *Wetland*, as defined above in this section.

Wetland delineation means outlining the boundaries of a wetland determination on aerial photography, digital imagery, other graphic representation of the area, or on the land.

(b) *Terms for FSA operations.* In the regulations in this part, and in all instructions, forms, and documents in connection therewith, all other words and phrases specifically relating to FSA operations shall, unless required by the subject matter or the specific provisions of this part, have the meanings assigned to them in the regulations at part 718 of this title that govern reconstitutions of farms, allotments, and bases and any subsequent amendment thereto.

---

7 C.F.R. § 12.3 Applicability.

(a) *Geographic scope.* The provisions of this part shall apply to all land, including Indian tribal land, in the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Island of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Federated States of Micronesia, the Republic of Palau, and the Republic of the Marshall Islands.

(b) *Effective date.* The provisions of this part apply to all actions taken after July 3, 1996, and to determinations made after or pending on July 3, 1996, except to the extent

that § 12.5(a)(5) and 12.5 (b)(4) through (b)(8) specify retroactive application on December 23, 1985, and November 28, 1990, for certain actions and determinations regarding wetlands and converted wetlands. Actions taken and determinations made prior to July 3, 1996, are subject to regulations set forth in this part as of July 2, 1996, except as otherwise provided in this part. Further, to the extent that a person may be eligible for an exemption for an action taken before July 3, 1996, the action is subject to the provisions of this part.

---

7 C.F.R. § 12.4 Determination of ineligibility.

(a) *Actions.* Except as provided in § 12.5, a person shall be ineligible for all or a portion of USDA program benefits listed in this section if:

(1) The person produces an agricultural commodity on a field in which highly erodible land is predominant, or designates such a field for conservation use;

(2) The person produces an agricultural commodity on wetland that was converted after December 23, 1985; or

(3) After November 28, 1990, the person converts a wetland by draining, dredging, filling, leveling, removing woody vegetation, or other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible.

* * *

(c) *Wetland conservation.* A person determined to be ineligible under paragraph (a)(2) of this section shall be ineligible for all or a portion of the USDA program benefits

listed in paragraph (d) of this section for which the person otherwise would have been eligible during the crop year of the commodity that was planted on the converted wetland. A person determined to be ineligible under paragraph (a)(3) of this section for the conversion of a wetland shall be ineligible for all or a portion of the USDA program benefits listed in paragraph (d) of this section for which the person otherwise would have been eligible during the crop year which is equal to the calendar year during which the violation occurred and each subsequent crop year until the converted wetland is restored or the loss of wetland functions and values have been mitigated prior to the beginning of such calendar year in accordance with § 12.5(b)(4)(i) (A) and (C) through (F) of this part. Ineligibility under paragraph (a)(2) or (a)(3) of this section may be reduced, in lieu of the loss of all benefits specified under paragraph (d) of this section for such crop year, based on the seriousness of the violation, as determined by the FSA Deputy Administrator for Farm Programs or designee upon recommendation by the FSA County Committee. Factors such as the information that was available to the affected person prior to the violation, previous land use patterns, the existence of previous wetland violations under this part or under other Federal, State, or local wetland provisions, the wetland functions and values affected, the recovery time for full mitigation of the wetland functions and values, and the impact that a reduction in payments would have on the person's ability to repay a USDA farm loan shall be considered to making this determination.

* * *

(g) *Determination of ineligibility.* For the purpose of paragraph (a) of this section, a person shall be determined

to have produced an agricultural commodity on a field in which highly erodible land is predominant or to have designated such a field for conservation use, to have produced an agricultural commodity on converted wetland, or to have converted a wetland if:

(1) NRCS has determined that –

(i) Highly erodible land is predominant in such field, or

(ii) All or a portion of the field is converted wetland; and

(2) FSA has determined that the person is or was the owner or operator of the land, or entitled to share in the crops available from the land, or in the proceeds thereof; and

(3) With regard to the provisions of paragraph (a)(1) and (a)(2) of this section, FSA has determined that the land is or was planted to an agricultural commodity or was designated as conservation use during the year for which the person is requesting benefits.

(h) *Intent to participate in USDA programs.* Persons who wish to participate in any of the USDA programs described in paragraph (d) or (e) of this section are responsible for contacting the appropriate agency of USDA well in advance of the intended participated date so that Form AD-1026 can be completed. This contact will help assure that the appropriate determinations regarding highly erodible land or wetland, and conservation plans or conservation systems are scheduled in a timely manner. A late contact may not allow sufficient time for USDA to service the request and could result in a substantial delay

in receiving a USDA determination of eligibility or ineligibility.

---

7 C.F.R. § 12.5 Exemption.

* * *

(b) *Exemptions for wetlands and converted wetlands –*
(1) General exemptions.

A person shall not be determined to be ineligible for program benefits under § 12.4 as the result of the production of an agricultural commodity on converted wetland or the conversion of wetland if:

(i) The land is a prior-converted cropland and meets the definition of a prior-converted cropland as of the date of a wetland determination by NRCS;

(ii) The land has been determined by NRCS to be a prior-converted cropland and such determination has been certified, and NRCS determines that the wetland characteristics returned after the date of the wetland certification as a result of –

(A) The lack of maintenance of drainage, dikes, levees, or similar structures,

(B) The lack of management of the lands containing the wetland, or

(C) Circumstances beyond the control of the person;

(iii) The land was determined by NRCS to be a farmed wetland or a farmed-wetland pasture and –

(A) Such land meets wetland criteria through a voluntary restoration, enhancement, or creation action after that determination,

(B) The technical determinations regarding the baseline site conditions and the restoration, enhancement, or creation actions have been adequately documented by NRCS,

(C) The proposed conversion action is documented by the NRCS prior to implementation, and

(D) The extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed at the time of implementation of the voluntary wetland restoration, enhancement, or creation action;

(iv) NRCS has determined that the conversion is for a purpose that does not make the production of an agricultural commodity possible, such as conversions for fish production, trees, vineyards, shrubs, cranberries, agricultural waste management structures, livestock ponds, fire control, or building and road construction and no agricultural commodity is produced on such land;

(v) NRCS has determined that the actions of the person with respect to the conversion of the wetland or the combined effect of the production of an agricultural commodity on a wetland converted by the person or by someone else, individually and in connection with all other similar actions authorized by NRCS in the area, would have only a minimal effect on the wetland functions and values of wetlands in the area;

(vi)(A) After December 23, 1985, the Army Corps of Engineers issued an individual permit pursuant to section

404 of the Clean Water Act, 33 U.S.C. 1344, authorizing such action and the permit required mitigation that adequately replaced the functions and values of the wetlands converted, as determined by NRCS, or

(B) After December 23, 1985, the action is encompassed under section 404 of the Clean Water Act, 33 U.S.C. 1344, by an Army Corps of Engineers nationwide or regional general permit and the wetland functions and values were adequately mitigated, as determined by NRCS; or

(vii) The land is determined by NRCS to be –

(A) An artificial wetland,

(B) A wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation.

(C) A nontidal drainage or irrigation ditch excavated in non-wetland, or

(D) A wetland converted by actions of persons other than the person applying for USDA program benefits or any of the person's predecessors in interest after December 23, 1985, if such conversion was not the result of a scheme or device to avoid compliance with this part. Further drainage improvement on such land is not permitted without loss of eligibility for USDA program benefits, unless NRCS determines under paragraph (b)(1)(v) of this section that further drainage activities applied to such land would have minimal effect on the wetland functions and values in the area. In applying this paragraph, a converted wetland shall be presumed to have been converted by the person applying for USDA program benefits unless the person can show that the conversion was

caused by a third party with whom the person was not associated through a scheme or device as described under § 12.10 of this part. In this regard, activities of a water resource district, drainage district, or similar entity will be attributed to all persons within the jurisdiction of the district or other entity who are assessed for the activities of the district or entity. Accordingly, where a person's wetland is converted due to the actions of the district or entity, the person shall be considered to have caused or permitted the drainage. Notwithstanding the provisions of the preceding sentences and as determined by FSA to be consistent with the purposes of this part, the activities of a drainage district or other similar entity will not be attributed to a person to the extent that the activities of the district or entity were beyond the control of the person and the wetland converted is not used by the person for the production of an agricultural commodity or a forage crop for harvest by mechanical means or mitigation for the converted wetland occurs in accordance with this part.

(2) *Commenced conversion wetlands.* (i) The purpose of a determination of a commenced conversion made under this paragraph is to implement the legislative intent that those persons who had actually started conversion of a wetland or obligated funds for conversion prior to December 23, 1985, would be allowed to complete the conversion so as to avoid unnecessary economic hardship.

(ii) All persons who believed they had a wetland or converted wetland for which conversion began but was not completed prior to December 23, 1985, must have requested by September 19, 1988, FSA to make a determination of commencement in order to be considered exempt under this section.

(iii) Any conversion activity considered by FSA to be commenced under this section lost its exempt status if such activity as not completed on or before January 1, 1995. For purposes of this part, land on which such conversion activities were completed by January 1, 1995, shall be evaluated by the same standards and qualify for the same exemptions as prior-converted croplands. For purposes of this part, land on which such conversion activities were not completed by January 1, 1995, shall be evaluated by the same standards and qualify for the same exemptions as wetlands or farmed wetlands, as applicable.

(iv) Only those wetlands for which the construction had begun, or to which the contract or purchased supplies and materials related, qualified for a determination of commencement. However, in those circumstances where the conversion of wetland did not meet the specific requirements of this paragraph, the person could have requested a commencement of conversion determination from the FSA Deputy Administrator for Farm Programs, upon a showing that undue economic hardship would have resulted because of substantial financial obligations incurred prior to December 23, 1985, for the primary and direct purpose of converting the wetland.

(3) *Wetlands farmed under natural conditions.* A person shall not be determined to be ineligible for program benefits under § 12.4 of this part as a result of the production of an agricultural commodity on a wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce agricultural commodities in a manner that is consistent for the area, where such production is possible as a result of natural conditions, such as drought, and is without action by the

producer that alters the hydrology or removes woody vegetation.

(4) *Mitigation.* (i) No person shall be determined to be ineligible under § 12.4 for any action associated with the conversion of a wetland if the wetland functions and values are adequately mitigated, as determined by NRCS, through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland, if the mitigation –

(A) Is in accordance with a mitigation plan approved by NRCS;

(B) Is in advance of, or concurrent with, the wetland conversion or the production of an agricultural commodity, as applicable;

(C) Is not at the expense of the federal government in either supporting the direct or indirect costs of the restoration activity or costs associated with acquiring or securing mitigation sites, except if conducted under a mitigation banking pilot program established by USDA;

(D) Occurs on lands in the same general area of the local watershed as the converted wetlands, provided that for purposes of this paragraph, lands in the same general area of the local watershed may include regional mitigation banks;

(E) Is on lands for which the owner has granted an easement to USDA, recorded the easement on public land records, and has agreed to the maintenance of the restored, created, or enhanced wetland for as long as the converted wetland for which the mitigation occurred remains in agricultural use or is not returned to its original wetland classification with equivalent functions and values; and

(F) Provides the equivalent functions and values that will be lost as a result of the wetland conversion.

(ii) A mitigation plan is a record of decisions that document the actions necessary to compensate for the loss of wetland functions and values that result from converting a wetland. The mitigation plan may be a component of a larger natural resources conservation plan.

(iii) The State Conservationist, in consultation with the State Technical Committee, may name certain types or classes of wetland not eligible for exemption under paragraph (b)(4)(i) of this section where the State Conservationist determines that mitigation will not achieve equivalent replacement of wetland functions and values within a reasonable time frame or for other reasons identified by the State Conservationist. Any type or class of wetland that a State Conservationist identifies as not eligible for exemption under paragraph (b)(4)(i) of this section will be published in the FEDERAL REGISTER for inclusion in this part.

(5) *Good Faith Violations.* (i) A person who is determined under § 12.4 to be ineligible for benefits as the result of the production of an agricultural commodity on a wetland converted after December 23, 1985, or as the result of the conversion of a wetland after November 28, 1990, may regain eligibility for benefits if –

(A) FSA determines that such person acted in good faith and without the intent to violate the wetland provisions of this part, and

(B) NRCS determines that the person within an agreed to period, not to exceed 1 year, is implementing all practices in a mitigation plan.

(ii) In determining whether a person acted in good faith under paragraph (b)(5)(i)(A) of this section, the FSA shall consider such factors as whether –

(A) The characteristics of the site were such that the person should have been aware that a wetland existed on the subject land,

(B) NRCS had informed the person about the existence of a wetland on the subject land.

(C) The person did not convert the wetland, but planted an agricultural commodity on converted wetland when the person should have known that a wetland previously existed on the subject land,

(D) The person has a record of violating the wetland provisions of this part or other Federal, State, or local wetland provisions, or

(E) There exists other information that demonstrates that the person acted with the intent to violate the wetland provisions of this part.

(iii) After the requirements of paragraph (b)(5)(i) of this section are met, USDA may waive applying the ineligibility provisions of § 12.4.

(6) *Reliance upon NRCS wetland determination.* (i) A person shall not be ineligible for program benefits as a result of taking an action in reliance on a previous certified wetland determination by NRCS.

(ii) A person who may be ineligible for program benefits as the result of the production of an agricultural commodity on converted wetland or for the conversion of a wetland may seek relief under § 12.11 of this part if such

action was taken in reliance on an incorrect technical determination by NRCS as to the status of such land. If the error caused the person to make a substantial financial investment, as determined by the NRCS, for the conversion of a wetland, the person may be relieved of ineligibility for actions related to that portion of the converted wetland for which the substantial financial investment was expended in conversion activities. The relief available under this paragraph shall not apply to situations in which the person knew or reasonably should have known that the determination was in error because the characteristics of the site were such that the person should have been aware that a wetland existed on the subject land, or for other reasons.

(7) *Responsibility to provide evidence.* It is the responsibility of the person seeking an exemption related to converted wetlands under this section to provide evidence, such as receipts, crop-history data, drawings, plans or similar information, for purposes of determining whether the conversion or other action is exempt in accordance with this section.

CODE OF FEDERAL REGULATIONS

Agriculture

AS OF JANUARY 1, 1996

7 C.F.R. § 12.33 Use of wetland and converted wetland.

(a) The provisions of § 12.32(a)(3) are intended to protect remaining functional values of the wetlands described therein. Persons may continue to farm such wetlands under natural conditions or as they did prior to December 23, 1985, However, no action can be taken to increase effects on the water regime beyond that which existed on such lands on or before December 23, 1985 unless SCS determines the effect on remaining wetland values would be minimal under § 12.5(b)(1)(iii).

(b) Unless otherwise provided in this part, the production of an agricultural commodity on wetlands that were converted before, or for which the conversion was commenced before, December 23, 1985, is exempted by law from these regulations for the area which was converted or the minimum area the commenced activity could convert. Maintenance or improvement of these converted wetlands for the production of agricultural commodities are not subject to this rule so long as such actions do not bring additional wetland into the production of an agricultural commodity. Additional wetland means any natural wetland or any converted wetland that has reverted to wetland as the result of abandonment of crop production. Abandonment is the cessation of cropping, management or maintenance operations related to the production of agricultural commodities on converted wetland. Where the

cessation of such cropping, management or maintenance operations has occurred, converted wetland is considered to be abandoned unless it is shown that there was no intent to abandon; provided, however, that at the end of five successive years during which there was no crop production, such land shall be determined to be abandoned if the land meets the wetland criteria of § 12.31. Participation in a USDA set-aside, diverted acres, or similar programs shall not be deemed to constitute abandonment. Furthermore, the maintenance of any alteration or manipulation that affects the reach or flow of water made to a wetland that was cropped before December 23, 1985, would not cause a person to be determined to be ineligible under this part, provided that the maintenance does not exceed the scope and effect of the original alteration or manipulation, as determined by SCS, and provided that the area is not abandoned.

Supreme Court, U.S.
FILED
JUL 12 2005
OFFICE OF THE CLERK

(2)
No. 04-1502

In the Supreme Court of the United States

HORN FARMS, INC., PETITIONER

v.

MIKE JOHANNS,
SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MICHAEL JAY SINGER
JOHN S. KOPPEL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture reasonably interpreted the "prior-converted wetland" exemption to a wetlands-protection provision of the Food Security Act of 1985, 16 U.S.C. 3822(b)(2)(D), to apply only to land that did not have "wetland" status on the effective date (December 23, 1985) of the statutory program.

2. Whether Congress engaged in impermissible coercion under the Spending Clause of the Constitution, Art. I, § 8, Cl. 1, when it conditioned the receipt of certain farm subsidies upon preservation of wetlands.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Barthel v. *United States Dep't of Agric.*, 181 F.3d 934 (8th Cir. 1999) 8, 10, 11

Bradley v. *Arkansas Dep't of Educ.*, 189 F.3d 745 (8th Cir. 1999) 15

Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 6, 11

Doe v. *of Nebraska*, 345 F.3d 593 (8th Cir. 2003) 15

Gunn v. *United States Dep't of Agric.*, 118 F.3d 1233 (8th Cir. 1997), cert. denied, 522 U.S. 1111 (1998) 8, 9, 10

Jim C. v. *Arkansas Dep't of Educ.*, 235 F.3d 1079 (8th Cir. 2000), cert. denied, 533 U.S. 949 (2001) 15

Kansas v. *United States*, 214 F.3d 1196 (10th Cir.), cert. denied, 531 U.S. 1035 (2000) 15

Nevada v. *Skinner*, 884 F.2d 445 (9th Cir.1989), cert. denied, 493 U.S. 1070 (1990) 15

New York v. *United States*, 505 U.S. 144 (1992) 13

Cases—Continued: Page

Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 13
South Dakota v. *Dole*, 483 U.S. 203 (1987) .. 7, 13, 14, 15
Steward Mach. Co. v. *Davis*, 301 U.S. 548 (1937) 15
United States v. *Butler*, 297 U.S. 1 (1936) 15
West Virginia v. *United States Dep't of Health & Human Servs.*, 289 F.3d 281 (4th Cir. 2002) 15
Wickard v. *Filburn*, 317 U.S. 111 (1942) 7

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8, Cl. 1 (Spending Clause) 4, 12, 13, 15
Amend. X 15
Act of Apr. 4, 1996, Pub. L. No. 104-27, § 322(b), 110 Stat. 988 (16 U.S.C. 3822(b)(2)(D)) 2
Food Security Act of 1985, 16 U.S.C. 3821 *et seq.*:
16 U.S.C. 3821-3824 2
16 U.S.C. 3821(b) 2
16 U.S.C. 3821(c) 2
16 U.S.C. 3822(b)(1)(A) 9
16 U.S.C. 3822(b)(2)(D) 2, 3, 4, 5, 6, 7, 8, 10, 12
5 U.S.C. 558 8
7 C.F.R.:
Section 12.2(a) 2, 3
Section 12.5(b)(1)(i)-(ii) 3

In the Supreme Court of the United States

No. 04-1502

HORN FARMS, INC., PETITIONER

v.

MIKE JOHANNS,
SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 397 F.3d 472. The opinion of the district court (Pet. App. 12a-52a) is reported at 319 F. Supp. 2d 902.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2005. The petition for a writ of certiorari was filed on May 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Wetland Conservation Provisions (commonly known as the "Swampbuster" provisions) of the Food Security Act of 1985 (1985 Act), 16 U.S.C. 3821-3824, farmers are generally ineligible for certain United States Department of Agriculture (USDA) farm subsidies if they convert wetlands to farmland. See 16 U.S.C. 3821(b) and (c). In 1996, however, Congress provided an exemption from ineligibility that applies when a farmer converts "[a] wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date." Pub. L. No. 104-27, § 322(b), 110 Stat. 988 (16 U.S.C. 3822(b)(2)(D)). This case involves the application of Section 3822(b)(2)(D) to wetlands that were converted to farm use at some point in the relatively distant past, reverted to wetland status before December 23, 1985, and were restored to agricultural status in 1998. See Pet. App. 2a.

The Secretary of Agriculture has consistently construed the Swampbuster provisions to incorporate December 23, 1985—the original effective date of the Swampbuster program—as the benchmark date for establishing the wetland or cropland status of land. The Secretary's regulations define the term "[c]onverted wetland" to mean "a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated * * * for the purpose of or to have the effect of making possible the production of an agricultural commodity." 7 C.F.R. 12.2(a) ("Wetland determination" Subsection (3)). A converted wetland is categorized as "[n]on-wetland" if "the conversion * * * occurred prior to

December 23, 1985, and on that date, the land did not meet wetland criteria but an agricultural commodity was not produced and the area was not managed for pasture or hay." 7 C.F.R. 12.2(a) ("Wetland determination" Subsection (7)(ii)). The regulations define the term "[p]rior-converted cropland" to mean "a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation." 7 C.F.R. 12.2(a) ("Wetland determination" Subsection (8)).

Thus, under the USDA regulations implementing Section 3822(b)(2)(D), a particular tract can be certified as a prior-converted wetland, thereby triggering the statutory exemption, only if the tract was suitable for agricultural uses as of December 23, 1985. The Natural Resources and Conservation Service (NRCS) within USDA is responsible for technical determinations regarding the application of the statutory and regulatory criteria to particular tracts. 7 C.F.R. 12.5(b)(1)(i)-(ii).

2. Gene Horn owns and operates petitioner Horn Farms, Inc., which farms approximately 1400 acres in Fulton and Cass Counties, Indiana. Pet. App. 13a. In 1995, Mr. Horn purchased the acreage at issue in this litigation. *Ibid.* In 1998, believing that the parcel had previously been farmed but had reverted to wetland status due to lack of maintenance, Mr. Horn cleared several tracts of trees and vegetation and restored a drainage system for the production of agricultural commodities. *Ibid.*

In March 1999, the NRCS district conservationist conducted a site-assessment of the relevant parcel. Pet. App. 13a-14a. The district conservationist determined

that, because the parcel had reverted to wetland status prior to December 23, 1985, the tracts that Mr. Horn had cleared and drained in 1998 did not qualify as prior-converted wetlands under 16 U.S.C. 3822(b)(2)(D). Pet. App. 14a. Based on that assessment, NRCS notified petitioner that the agency had made a preliminary technical determination that 6.2 acres of the parcels at issue were wetlands as of December 23, 1985. *Id.* at 15a-16a. The County Committee terminated petitioner's federal benefits beginning with the 1999 crop year, and no subsequent payments have been made. *Id.* at 16a.

3. After a failed mediation attempt and unsuccessful administrative appeals, petitioner filed suit in federal district court. Pet. App. 16a-19a. Petitioner alleged, *inter alia*, that (a) the Swampbuster provisions of the Farm Security Act violate the Spending Clause of the United States Constitution, Art. I, § 8, Cl. 1, by impermissibly coercing benefit recipients to comply with the conditions of payment, and (b) the decisions of the USDA resulting in the termination of petitioner's benefits were arbitrary, capricious, an abuse of discretion, and not in accordance with the law. The district court granted and denied each side's summary judgment motion in part, but ultimately provided relief to petitioner. Pet. App. 12a-52a.

a. The district court rejected petitioner's Spending Clause challenge to the Swampbuster provisions at issue in this case. Pet. App. 36a-39a. The court agreed with petitioner that "the Swampbuster provisions are coercive, in fact, they give the USDA a big club with which to protect wetlands." *Id.* at 37a. The court observed, however, that "establishing that Congress has placed 'unconstitutional conditions' on the receipt of federal funding is an uphill battle," *ibid.*, and that "Congress

can condition appropriation in very important ways that permit the creation of public policy indirectly which sometimes could not be done directly," *id.* at 38a. The court concluded that, while Congress might lack authority to forbid the conversion to agricultural use of the wetlands on petitioner's property, the challenged conditions on federal agricultural subsidies do not violate the Constitution. See *id.* at 38a-39a.

b. The district court held that USDA had acted arbitrarily and capriciously by refusing to treat the parcels at issue as prior-converted wetlands. See Pet. App. 39a-47a. Petitioner construed the phrase "after that date" in 16 U.S.C. 3822(b)(2)(D) to mean "after the date that the wetland was originally converted." Pet. App. 42a. Under that view, all wetlands that were originally converted to agricultural use before the effective date of the original Swampbuster provisions (December 23, 1985) would fall within the Section 3822(b)(2)(D) exemption even if they had already reverted to wetland status by that date. *Ibid.*

The district court found the language of Section 3822(b)(2)(D) to be ambiguous, see Pet. App. 42a, 44a, and it stated that the agency's interpretation was reasonable, see *id.* at 44a. The court recognized that, under established principles of administrative law, the determination that USDA's construction was reasonable "would ordinarily end the analysis." *Ibid.* Based on a passage from the legislative history of the initial 1985 legislation, however, the court concluded that Congress had considered the question and had endorsed petitioner's reading of the relevant statutory provision. See *id.* at 44a-47a.

4. The court of appeals reversed. Pet. App. 1a-11a.

a. The court of appeals sustained the USDA's denial of farm subsidies to petitioner, holding that the challenged agency action rested on a permissible construction of 16 U.S.C. 3822(b)(2)(D). Pet. App. 4a-7a. The court stated that "Section 3822(b)(2)(D) is ambiguous. The referent of 'that date' could be December 23, 1985, as the Secretary contends, but it also could be the date on which the wetland was 'previously identified' or the date on which the 'original conversion . . . was commenced'." *Id.* at 4a. The court found, however, that "[s]everal contextual elements support the Secretary's reading," *ibid.*, and it concluded that the Secretary's interpretation "is the most sensible understanding of the legislation," *id.* at 5a. The court explained, *inter alia*, that "when 'that date' is understood to be December 23, 1985, the subsection is a non-degradation clause: the legislation protects wetlands as they actually existed on the date of its enactment, penalizing withdrawals without attempting to restore lands then under agricultural production." *Ibid.* Under petitioner's interpretation, by contrast,

> [r]eading "that date" to be the time of original conversion would allow net reductions in wetlands after the legislation's enactment—and would allow them in ways that are difficult to police, because there would be few records to show the date of original conversion, so farmers who drained wetlands after 1985 could make hard-to-refute claims that they were just going back to some long-forgotten state of affairs.

Ibid.

The court of appeals also held that the Secretary's interpretation of 16 U.S.C. 3822(b)(2)(D) was entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 5a. The court explained that the agency's construction of Section 3822(b)(2)(D) is expressed in regulations adopted after notice-and-comment rulemaking and "concerns the Secretary's administration of a federal program." *Ibid.* The court further held that a single statement by one of the 1985 Act's sponsors, on which the district court had relied, provided no basis for rejecting the USDA's construction of the relevant statutory language. The court explained that (i) the statement in question was made in 1985 and thus could not shed meaningful light on the proper construction of the 1996 amendments, and (ii) the view of a single legislator could not in any event override the responsible agency's reasonable interpretation of an ambiguous statutory provision. See *id.* at 5a-7a.

b. The court of appeals rejected petitioner's "contention that Congress lacks authority to make subsidies contingent on preserving wetlands." Pet. App. 7a; see *id.* at 7a-8a. The court explained that, under this Court's decision in *South Dakota* v. *Dole*, 483 U.S. 203, 207-208 (1987) (*Dole*), "conditions set on expenditures must (i) promote the general welfare, (ii) be unambiguous (at least when they affect states), and (iii) relate to a legitimate federal interest." Pet. App. 7a-8a. The court held that the challenged condition on agricultural subsidies satisfies each of those requirements, *id.* at 8a, and that it was consequently "unnecessary to determine whether the legislation could be supported at any event by the national commerce power," *ibid.* (citing *Wickard* v. *Filburn*, 317 U.S. 111 (1942)). The court also ob-